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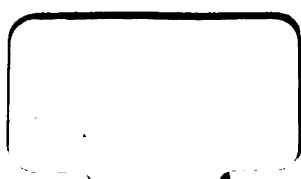
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U. Brit. Court of Chancery
REPORTS OF CASES

HEARD AND DETERMINED BY

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

BY

J. P. DE GEX, S. MACNAGHTEN, AND A. GORDON, Esqs.,

BARRISTERS AT LAW.

EDITED,

**WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,**

BY

J. C. PERKINS.

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SIR FREDERIC THESIGER, } GENERAL.

SIR WILLIAM PAGE WOOD, } SOLICITORS-GENERAL.
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MEMORANDA.

In October, 1851, Her Majesty, under the authority of the 14 & 15 Vict. c. 83, appointed the Right Honourable Sir JAMES LEWIS KNIGHT BRUCE and the Right Honourable Lord CRANWORTH to be Judges of the Court of Appeal in Chancery.

In Trinity vacation, 1851, RICHARD TORIN KINDERSLEY, Esq., one of the Masters in Chancery, and JAMES PARKER, Esq., one of Her Majesty's Counsel, were appointed Vice-Chancellors, and afterwards received the honour of knighthood.

In Hilary vacation, 1852, Lord TRURO resigned the Great Seal, and the same was delivered to the Right Honourable Sir EDWARD BURTENSHAW SUGDEN, who was created a peer by the title of Lord ST. LEONARDS of Slaugham, in the county of Sussex.

At the same time, Sir ALEXANDER JAMES EDMUND COCKBURN resigned the office of Attorney-General, and was succeeded by Sir FREDERIC THESIGER.

At the same time, Sir WILLIAM PAGE WOOD resigned the office of Solicitor-General, and was succeeded by Sir FITZROY KELLY.

In the same vacation, CHARLES JOHN CROMPTON, Esq., was appointed one of the Judges of the Court of Queen's Bench, in the place of Sir JOHN PATTESON, resigned.

In August, 1852, Sir JAMES PARKER died, and was succeeded in the office of Vice-Chancellor by JOHN STUART, Esq., one of Her Majesty's Counsel.



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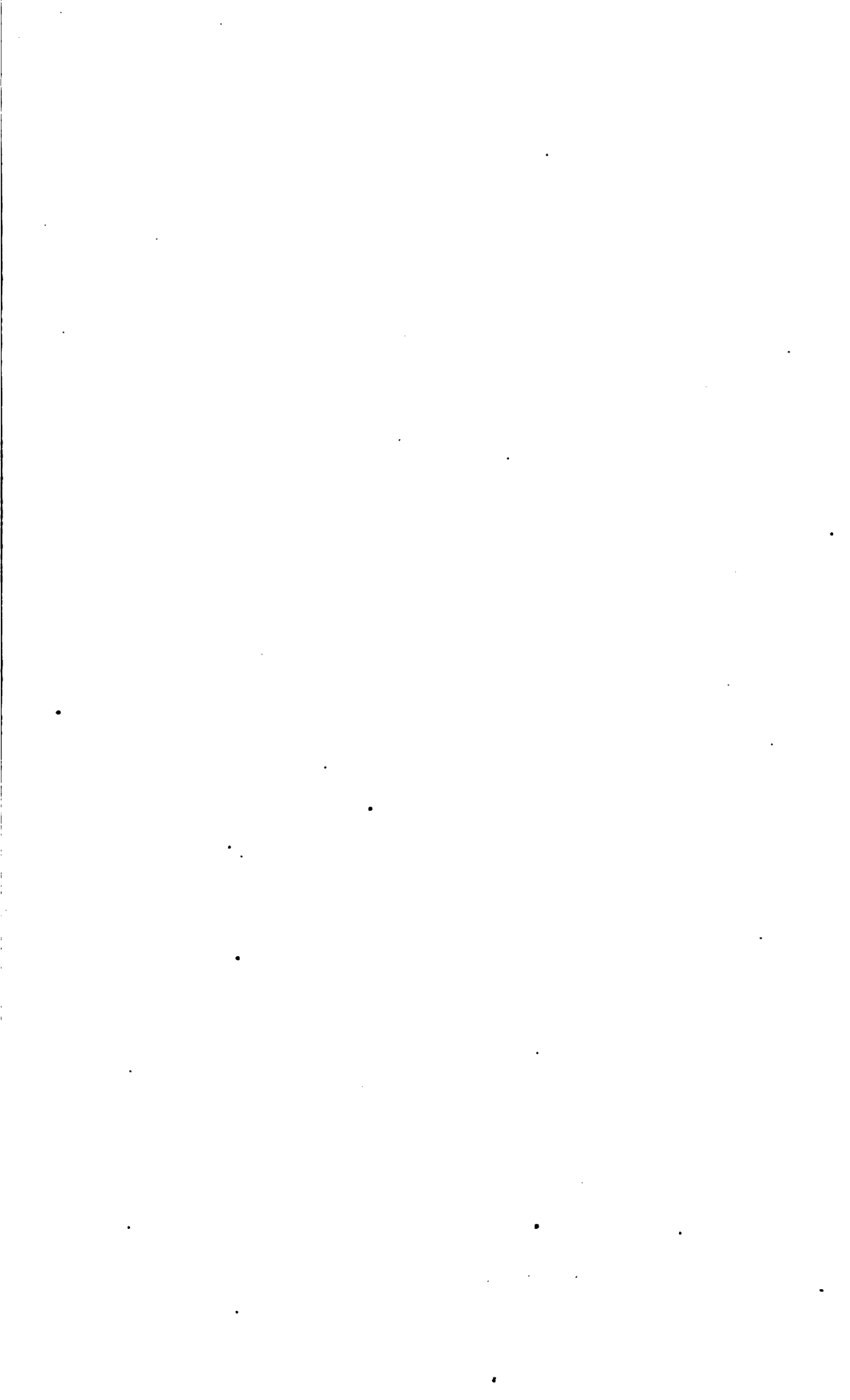
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ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

In the Matter of the NORTH of ENGLAND JOINT-STOCK BANKING COMPANY and of the JOINT-STOCK COMPANIES WINDING-UP ACT, 1848 (11 & 12 Vict. c. 45).

Ex parte HALL.

1851. November 8. Before the Lord Chancellor Lord TRURO.

The general rule of practice of the Court of Chancery, by which a successful appellant is not allowed the costs of his appeal, does not apply to proceedings under the Winding-up Acts, but the costs of all the proceedings are in the discretion of the Court.

In a case where the official manager succeeded before the Master and on appeal before the Vice-Chancellor in obtaining the name of a party to be included in the list of contributories, but these decisions were ultimately reversed by the Lord Chancellor, the costs of all the proceedings, including the costs of the appeals and in the Master's office, were ordered to be paid by the official manager to the party sought to be charged.

MRS. OUTERSTON, a widow lady, possessing shares in the North of England Joint-stock Banking Company as representing her deceased husband in whose name the shares stood, on occasion of her second marriage assigned them by deed to Mr. Hall as a trustee for herself, but no transfer of the shares according to the provisions of the deed of settlement of the company was actually made.

* On the winding up of the company, the Master held Mr. * 2 Hall liable as a contributory without qualification : on appeal to

the Vice-Chancellor KNIGHT BRUCE, his Honor held him liable as a contributory, but limited his liability to a period not anterior to the date of the deed assigning the shares to him. Both parties then appealed to the late Lord Chancellor Lord COTTENHAM, who held that on the evidence as it stood there was nothing to show that Mr. Hall was liable, and to this extent therefore reversed the decision of the Master and of the Vice-Chancellor: his Lordship, however, directed the appeal motion of Mr. Hall, so far as it sought to strike his, Mr. Hall's, name out of the list of contributories, to stand over with liberty for the official manager to take such proceedings at law as he should be advised, such proceedings to be taken within six months from that time [the 10th November, 1849. (a)]

No proceedings having been taken by the official manager in pursuance of the liberty thus given, the case was brought on by Mr. Hall before the present Lord Chancellor on the 31st July, 1851, when his Lordship ordered that the name of Mr. Hall should be struck out of the list of contributories of the company, and directed the official manager to pay to Mr. Hall the costs asked by his notice of motion. These costs were: first, the costs of resisting the proceedings of the official manager against him in the Master's office; secondly, the costs of his appeals to the Vice-Chancellor and to the Lord Chancellor Lord COTTENHAM; thirdly, the costs of the appeal of the official manager to Lord COTTENHAM; and, fourthly, the costs of the application to the Lord Chancellor on the 31st July, 1851.

* 3 The official manager now moved that the minutes of * the order might be varied by striking out so much thereof as directed the payment of these costs to Mr. Hall.

Mr. Bacon, for the official manager, relied on the ordinary rule of practice according to which an appellant, though successful, does not get his costs, and referred to the 118th section of the Winding-up Act, 1848, directing the general practice of the Court of Chancery to be followed in proceedings under that Act.

Mr. Malins, contra, insisted that the rule did not apply to this case, and that the question of costs was under the Winding-up Act left

(a) See 1 Mac. & G. 307.

in the discretion of the Court; that the course of practice under the Act had been to give to the party successfully resisting an attempt to make him liable as a contributory, the whole of his costs, including those of the proceedings in the Master's office. He referred to the Act 11 & 12 Vict. c. 45, § 104, and to *Ex parte Riddell*. (a)

Mr. Bacon denied that the practice under the Act had been such as stated by *Mr. Malins*.

Mr. J. V. Prior appeared with *Mr. Bacon* for the official manager; and *Mr. Hallett* with *Mr. Malins* for *Mr. Hall*.

THE LORD CHANCELLOR observed, that if it had been clear that any general rule of practice had been adopted in these cases, he should have followed it, but that, as this was not admitted, he must form his own opinion on the point. His Lordship then proceeded to the following effect:—

* Although there is a general rule in this Court and in the * 4 House of Lords, that a successful appellant does not get costs, it has been frequent matter of comment that this rule bears hardly on such parties; for it often happens, especially in the House of Lords, that the appellant obtains relief against an adverse decree in the Court below at a cost far beyond the value of that relief, purchasing it, in fact, at an expenditure greater than the stake for which he is contending. Such being the feeling with respect to the rule, I think no one now making a law would lay down such a rule as one to be followed; and it thus becomes of importance to consider whether it ought to be followed in administering that system of equity which has been introduced by the Winding-up Acts. The Court ought to be well satisfied of the expediency of the rule before importing it into a course of proceedings entirely new, and in some respects unprecedented. The 118th section of the Winding-up Act, 1848, has been referred to, and that section no doubt, with a view of laying down some rule of proceeding, directs the general practice of this Court to be followed "so far as the same shall be applicable, and so far as the same is not or shall not be inconsistent with this Act;" but when

this is coupled with the 104th section, enacting "that the costs of all proceedings which shall take place before the Court shall be in the discretion of the Court," it would seem pretty clear that some deviation from the ordinary rules as to costs was contemplated. It does not in fact appear that the Act lays down any general rule as to costs, or that there is any thing to prevent the Court exercising its discretion respecting them. The 103d section shows clearly that the Master was to exercise a discretion as to the costs of proving debts and other proceedings, the result of which might depend on proceedings either in the Master's office or before * 5 the Court. I think, therefore, that the * discretion which was to be exercised if the matter terminated in the Master's office, is carried with the case when it proceeds further, and that the Court may deal with the question of costs.

Having then, as it seems to me, jurisdiction in this matter, I am now to determine in what manner it should be exercised. It does not appear that the official manager is placed by the Act in a position different from that of any other individual; for if he fails in an attempt to charge a party before the Master, that party is entitled to his costs. Feeling then, that there is no necessity for importing the general rule as to the costs of appellants into proceedings under this Act, and that justice requires the adoption of a different rule, I am of opinion that Mr. Hall is entitled to his costs of all the appeals. I think also that the Court may give to a person who ultimately succeeds in rebutting an attempt to charge him as a contributory, the costs of the proceedings before the Master. Mr. Hall will therefore have these costs likewise, and the order will stand as drawn up by the registrar.

Mr. Bacon submitted that there should be no costs of the present application, as the point raised was new.

THE LORD CHANCELLOR, however, declined to give effect to this view of the matter, and refused the motion with costs.

* HODGSON v. THE EARL OF POWIS.¹

* 6

1851. November 13. Before the LORDS JUSTICES.

By three Acts of Parliament of the same session, a railway company was empowered to make three distinct lines, forming a cluster, and not a continuous line. In the next session an Act was passed, declaring the company to have been and to be only one company, and authorizing and requiring them to grant a lease of the lines to another company. They completed only one of the lines, which was worked by the other company under the provisions of the last Act. Some months after it was obvious that the other two lines could not be completed within the time prescribed by the Acts, a shareholder in the first company filed a bill, seeking to restrain it from applying its funds otherwise than for the purpose of constructing all three of the lines; but he did not make the company, who were leasees, parties to the suit. *Held*, that more inconvenience would arise from the Court interfering than from its abstaining to do so;² and on this account, as well as on the grounds of acquiescence,³ and want of parties, an injunction granted by the Court below was dissolved.

Quære whether railways forming a cluster, differ from a continuous line with respect to the propriety of granting an injunction against the construction of part only of an undertaking authorized by the legislature.

THIS was an appeal from an order of the late Master of the Rolls, granting an injunction.

The facts are detailed in Mr. Beavan's report (a) of the case upon a demurrer, and subsequently on the motion upon which the order now in question was made. They may be shortly stated as follows: The Shropshire Union Railways and Canal Company were, under three distinct Acts of Parliament passed in the same session, empowered to make three distinct railways, forming not a continuous line, but a group of lines, one being from Shrewsbury to Stafford, another from Crewe to Newtown in Montgomeryshire, and the third from the Chester and Crewe branch of the Grand

¹ S. C., 15 Jur. 1022.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1640, and notes (2) and (3), and cases cited: *Wason v. Sanborn*, 45 N. H. 169; *Wilcox v. Wheeler*, 47 N. H. 488; *Eastman v. Company*, 47 N. H. 71; *Attorney-General v. Ely, &c., Railway Co.*, L. R. 6 Eq. 106.

³ See 2 Dan. Ch. Pr. (4th Am. ed.) 1639, 1640, 1663, and cases in notes; *Graham v. The Birkenhead, Lancaster and Cheshire Junction Railway Co.*, 2 M'N. & G. 146, note (2); *Ffooks v. The South-Western Railway Co.*, 1 Sm. & Gif. 142.

(a) 12 Beav. 392 and 529.

Junction Railway to Wolverhampton. Each of the three Acts authorized a distinct sum to be raised for the purposes of the line which it authorized to be made. In the following session of Parliament, an Act was passed declaring that the company mentioned in the three preceding Acts had ever been and was one company, and the same Act required the company to grant a lease of the lines to the London and North-Western Railway Company.

* 7 * The bill, which was filed by a shareholder in the company, alleged that the directors had constructed only one of the three lines, and did not intend to form the others, but threatened to apply the funds raised under all the Acts in works upon the single line. The bill prayed for an injunction to restrain the company and the directors from applying any moneys of the company, except for the purpose and with a view to the construction of the whole of the railways and works authorized by the three Acts, and from making further calls except for that purpose.

From the affidavits it appeared that the line which had been constructed was open for public traffic under the superintendence of a committee composed of members of the company and of the London and North-Western Company, by whom the line was actually worked under the statutory provision for a lease of it to them. From reports made by the directors in 1848, and a notice issued on 27th September, 1849, it appeared that the plaintiff must have been aware, long previously to the filing of the bill, that the other two railways were not intended to be formed and indeed could not be constructed within the time limited by the Acts. The affidavits contained statements calculated to show that the line already in operation might be rendered more profitable by means of additional expenditure upon it.

By the order appealed from, the defendants were restrained, as directors of the company, from applying any moneys then in the hands of them or any of them, paid by the holders of the 20l. shares of the said company, for or in respect of the shares held by them in the company, or which might thereafter be received by them under the provisions of the Shropshire Union Railways

* 8 and Canal, Shrewsbury and Stafford Railway * Act, 1846, Shrewsbury Union Railways and Canal, Newtown and Crewe, with branches, Act, 1846, and Shropshire Union Railways and Canal, Chester and Wolverhampton Line Act, 1846, for the purpose only of completing the railway and works from Shrewsbury

and Stafford, or otherwise except for the purpose and with a view to the construction of the whole of the railways and works authorized to be constructed under the powers and provisions of the three Acts, until the defendants should fully answer the bill, or further order. But the order was not to extend to prevent the defendants from paying debts or liabilities of the company contracted before the date of the notice of motion of the 18th day of December, 1849, or the current expenses of maintaining and working the railways and canals.

Mr. Rolt, Mr. Willcock and Mr. Speed, in support of the appeal.—*Cohen v. Wilkinson*, (a) which was relied upon by the plaintiffs in the Court below, does not apply, for in that case the undertaking consisted of a continuous line, whereas this is constituted of three distinct projects. Moreover, in *Cohen v. Wilkinson* no works had been executed,—not a turf had been turned. In the present case, if the injunction be continued, all that has been expended will be thrown away, and that consideration is sufficient to show that more mischief will be caused by interfering than by abstaining from interference till the questions in the cause are decided. And the plaintiff, who must have been aware more than a year ago that the two lines in question could not be completed within the time, cannot, after so long an acquiescence, obtain an injunction on an interlocutory application. At all *events *9 the injunction ought not to have been granted in the absence of the London and North-Western Company, which is importantly interested in the question.

Mr. Roundell Palmer, for the respondents.—It would be idle to found a distinction between this case and *Cohen v. Wilkinson*, upon the circumstance that the railways here do not form a continuous mathematical straight line. If such a distinction were adopted, the Court would have to prescribe what precise angles the lines must form with one another to constitute one undertaking. In *Graham v. Birkenhead, Lancashire, and Cheshire Junction Railway Company*, (b) no such distinction was attempted to be made, nor was there any difference between Lord

(a) 12 Beav. 125, 138; 1 Mac. & G. 481.

(b) 2 Mac. & G. 146.

COTTENHAM and Lord LANGDALE on this point. In that case the works were completed and ready to be opened, and all the benefit of them was lost by the injunction being granted, and yet the Court did not consider this circumstance as sufficient to preclude its interference by an interlocutory injunction. No such mischief would arise here, for the appellants have not shown that any expenditure not consistent with the injunction is requisite to prevent the line which has been completed from being profitably used. Current expenses are excepted out of the scope of the injunction, and in order to make a case for a larger exception, the appellants must specifically show for what necessary purpose it is to be introduced. It is incumbent upon those, who call upon the Court to withhold its interference in a case where they are violating their parliamentary contract, to prove clearly that more mischief will arise from the Court's interfering, than from its omitting to interfere.

* 10 * As to acquiescence, a plaintiff in a case of this kind is always met by one of two objections. If he applies for an injunction while the undertaking might by possibility be completed, he is told that his application is premature. If he waits till the possibility is past, he is met with the objection of acquiescence. How can it be told within what exact time works can be completed? It is almost entirely a question of expense, and would form far too unsubstantial a criterion for imputing acquiescence to a shareholder. In *Cohen v. Wilkinson*, (a) the bill was filed only ten days before the expiration of the parliamentary powers of the company, and yet the Master of the Rolls was so far from thinking the application too late that he refused to grant an injunction until an affidavit was made that there was no intention of completing the railway. In *Haines v. Taylor*, (b) Lord COTTENHAM said: "As to what Lord ELDON is supposed to have said in the case referred to (c) he could only have meant that the party ought to apply as soon as he had something to apply about, and not that he should come for an injunction with a certainty of having his motion refused. There can be no *laches*, delay, or acquiescence, where there is no injury to acquiesce in."

With regard to the nonjoinder of the London and North-Western

(a) 12 Beav. 125, 138; 1 Mac. & G. 481.

(b) 2 Phil. 209.

(c) *Birmingham Canal Company v. Lloyd*, 18 Ves. 515.

Railway Company, they contended that, as no demurrer was put in, the suit must be considered well constituted as to parties for the purpose of the motion, and that the lessees of the line, between whom and the plaintiff there was no privity of contract, were not necessary parties.

Mr. Speed, in reply.

*THE LORD JUSTICE KNIGHT BRUCE.— We have arrived *11 at the same conclusion as to this injunction, whether precisely by the same course of reasoning it is not very important to inquire. However, I wish the observations that I am about to make to be taken as proceeding from myself alone. I view this injunction in effect as preventing the defendants from applying a single shilling of the corporate money, unless for the purpose of paying debts and liabilities which were in existence at the date of the notice of motion at the Rolls, and for the current expenses of maintaining and working (as it is called) the railway or canals. Of course, therefore, it prevents them from laying out money in improving the railway or adding to the works or conveniences upon it or connected with it, as I understand the order. But to what state of things is this injunction applied? In the first place it is applied to a case in which a railway company, absent from the record, not only is importantly interested in the subject of the suit, but is in fact under a contract in the nature of a lease in possession of what is called the working of the railway. Nay, more, a case in which the affairs of the company are superintended by a joint committee composed of members selected and appointed from the railway company present and the absent company. But this is not all. One line of the system of railways in question, viz., that from Stafford to Shrewsbury being in actual operation, its continuance is not attempted to be stopped. The plaintiff concedes that in the actual state at which matters have arrived this line must proceed and go on; indeed a different proposition would be monstrous, for the effect of it would be that a very large amount of property would go to waste and destruction.¹ Therefore, in a case in which it is admitted that a part at least of the railway must go on, and in

¹ See *Graham v. The Birkenhead, Lancashire and Cheshire Junction Railway Co.*, 2 M'N. & G. 146, 161.

which an absent company is importantly interested, the
 * 12 plaintiff desires an injunction to prevent the application * of
 a single shilling in alterations, additions, or improvements
 which may be required to make the outlay that has been already
 incurred profitable to himself and his partners.

It may be that these remarks are sufficient to dispose of the
 case, but they are not all. The case has been assumed to be identical with or not importantly to differ from that of *Cohen v. Wilkinson*. (a) It is said that by some Acts of Parliament, forming in effect one, various lines of railway, all connected with one another, are authorized to be made; and it has been assumed, that because some part of the undertaking has been abandoned and cannot be completed, therefore another part, being not a continuation of the former, but a separate and distinct line, cannot be made. It has, however, been made and is in operation; and if it were not, I am not persuaded that the principle on which *Cohen v. Wilkinson* was decided applies.

But more, judging from the materials before the Court, I am of opinion that the unavoidable inference is, that for more than twelve months before the filing of this bill the plaintiff must have known that the abandoned lines were or would be abandoned, and known also that there was no reasonable chance or substantial possibility of making either of them within the time prescribed by Parliament for their completion. When I say more than twelve months I take into consideration the report of September, 1848, as well as the report of the directors of March, 1848, and the notice of September, 1849, which last was most clear whatever may be thought of the others, and that preceded by more than two months the filing of the bill. As a matter of fact I believe that for more than

* 13 * twelve months before Mr. Hodgson applied for an injunction he knew that these lines would not and could not be proceeded with, and that there was no intention existing anywhere to attempt to proceed with them, or either of them. The injunction granted was upon an interlocutory application, as to which the Court has always exercised a discretion with reference to the particular circumstances, and the greater amount of mischief likely to follow from granting or refusing an injunction.

In my opinion the plaintiff has come here with a very doubtful

(a) 12 Beav. 125, 138; 1 Mac. & G. 481.

equity, and, if his equity were plainer, he has shown a case in which greater mischief would be done to his own property and that of others by granting than by refusing this injunction. Independently of these circumstances the materials before the Court compel me to believe that there has been here an acquiescence of more than ordinary amount, and of a plain description. We think that it would be dangerous and injurious to the rights of all concerned that this injunction should be continued. The order in which Lord CRANWORTH concurs, although perhaps not exactly on the same grounds, will be to discharge the existing order and dissolve the injunction without prejudice to any future application in the cause, and without prejudice to any question, reserving the costs of this motion and of the motion before the Rolls.

THE LORD JUSTICE LORD CRANWORTH.—I entirely concur in the order which has just been pronounced. I have come to the same conclusion as Lord Justice KNIGHT BRUCE, and perhaps by nearly the same process of reasoning. I confess I had some difficulty in seeing any distinction between the effect of three Acts of Parliament, passed as these were, authorizing three lines, forming a cluster as it were, and one Act * authorizing one * 14 line. But although the principle may be the same, and although the parties omitting to construct the whole undertaking may be acting equally in violation of their parliamentary contract in both cases, yet the Court in the exercise of its jurisdiction is bound by all authority (and if an authority were wanting we should not have much difficulty in making one) to act on the circumstances of the case, and with a view to what in point of discretion appears to be for the benefit of the parties. Now I confess that where one line only has been authorized to be made, one may feel more willing to exercise that discretion than in another where several are authorized to be made, because when one line of several is completed, this, though not all which is authorized by the legislature, is yet a substantial whole in itself, and it might be a wrong exercise of discretion to interfere with what is completed, although it might not be wrong if what was done was only part of one whole thing. With this exception the principle involved in the two cases seems to me the same.

In this case the facts are clear. One line is completed, not however absolutely, since considerable expenditure which may be

usefully incurred, would render the outlay already made more profitable. Now the effect of this injunction is, that not a single shilling can be expended in repairing a rail. Early in the argument I was struck with a passage, in the order appealed from, qualifying the injunction by the explanation that it was not to extend to prevent the defendants from maintaining and working the railways and canal. Now the very necessity for introducing this qualification led me, at the very outset, to doubt whether the injunction could be right, and I tried to frame extensions of the qualification, so as to leave some matters untouched by the

* 15 injunction, which clearly ought * to be left to the discretion of the committee of management, if they were to have any management at all; and I found, as I introduced one modification after another, that I must modify the order to such an extent as to nullify the injunction. I came therefore to the practical conclusion that an injunction was not the right course, and that the Court could not anticipate all the expenditure which might be required. I do not forget that there is a conflict of evidence upon the question whether the proposed outlay would be conducive to the benefit of the company; but this appears to me not a question for the consideration of the Court, but rather for the shareholders among themselves.

Upon the subject of acquiescence, I adopt what has been said by the Lord Justice KNIGHT BRUCE, so that I need say nothing more on that head.

So much has been done, and so much more remains to be done, in order to render the expenditure which has been already incurred useful or profitable, that it would be unwise to fetter the discretion of the directors by continuing this injunction, and therefore it must be dissolved in the terms which Lord Justice KNIGHT BRUCE has already mentioned.

* PELLEY v. WATHEN.¹

* 16

1851. November 5, 6, 26. Before the LORDS JUSTICES.

A purchaser of property, subject to a mortgage, made, before the completion of his purchase, a second mortgage of it. He afterwards created a third mortgage, with respect to which the second mortgagee's conduct was such as to give it priority over his. Then the purchase was completed, the purchaser paying off the first mortgage, and taking a conveyance to a trustee for himself. On this occasion the title-deeds were handed to his solicitors, who afterwards took a transfer of the third mortgage. One of them was the trustee for the purchaser in the conveyance. The second mortgagee did not give them, nor had they any notice of his security.

Held that, nevertheless, their lien, either for their general bill of costs, or for their costs relating to the conveyance, could not prevail against the second mortgagee, the rights of a solicitor in respect of his lien for his bill of costs being no greater than those of the client, and the circumstances of the case not exempting it from the scope of this rule.*

Quære whether the lien of a solicitor is affected by his taking a partner.

THIS was an appeal from an order of Sir JAMES WIGRAM made on the hearing of the cause, on exceptions to the Master's report, and on further directions. The case is reported in the 6th volume of Mr. Hare's Reports, page 351. The facts were very complicated, but they may be stated within a comparatively narrow compass, so far as is necessary for the understanding of the questions decided upon the appeal.

Previously to the month of September, 1839, Mr. William Lewis had contracted to purchase the equity of redemption of certain property in Gloucestershire, which was designated as the Lyppiatt estate, and which was subject to two large mortgages for 18,000*l.* and 6000*l.* In order to enable him to raise money for completing the purchase, he agreed to sell part of the property to two gentlemen, who agreed to become purchasers. And by an indenture of the 14th of September, 1839, he conveyed to the plaintiff all his

¹ S. C., 16 Jur 47.

* See 2 Dan. Ch. Pr. (4th Am. ed.) 1842; *Francis v. Francis*, 2 De G., M. & G. 73; 5 id. 108; *Verity v. Wyld*, 4 Drew. 427; *Re Mayhew*, 7 W. R. 351, V. C. K.; *Turner v. Letts*, 20 Beav. 185; 1 Jur. N. S. 486; 7 De G., M. & G. 243; 1 Jur. N. S. 1057; *Ex parte Joseph Mackrill Smith*, L. R. 3 Ch. Ap. 125; *Re Gregson*, 26 Beav. 87. The lien of a solicitor is far from being the same as a mortgage. Lord Justice TURNER, in *Hope v. Liddell*, 7 De G., M. & G. 339. But see *Griffith v. Ricketts*, 7 Hare, 299.

real estates, including so much of the Lyppiatt estate as had not been so agreed to be sold, to hold the same to the plaintiff by way of mortgage for securing a running account not exceeding 10,000*l*.

* 17 * By another indenture, dated the 14th of December, 1840, Lewis mortgaged a part of the Lyppiatt property, comprised in the plaintiff's mortgage, to Horatio James, to secure 3000*l*.; and afterwards, by another mortgage, dated the 8th of September, 1841, he mortgaged the same property to Charles Barton, to secure 1000*l*.

The purchase of the property by Lewis had not, up to this time, been completed; but, in the month of January, 1842, the transactions were brought to a close in the following manner. The parts of the property which had been agreed to be sold were conveyed to the purchasers, and, by means of their purchase-money or otherwise, the two old mortgages of 18,000*l*. and 6000*l*. were paid off, and the legal fee in the parts not sold to the two sub-purchasers was conveyed to Thomas Bassett in trust for Lewis; and an outstanding term of 1000 years was, at the same time, assigned to John Gurney in trust to attend the inheritance. At this time, Thomas Bassett and John Gurney carried on business as attorneys and solicitors in partnership with the defendant George Wathen, under the firm of Wathen, Bassett, & Gurney; and that firm acted as solicitors for Lewis in the matter of the purchase, Wathen having in fact so acted for many years previously.

After the execution of these deeds, the only outstanding interests, exclusive of the plaintiff's mortgage, were the two mortgages vested in James and Barton. And George Wathen agreed with Lewis to pay off those charges, and to take assignments thereof to himself. This was accordingly done by two indentures, both dated and executed on the 14th of February, 1842, so that George Wathen became a mortgagee for the two sums of 3000*l*. and 1000*l*.

* 18 * In the following month of August, he advanced a further sum of 673*l*. on security of the same premises, and thus became an incumbrancer for a principal sum of 4673*l*.

It was taken as a fact not in dispute, that the plaintiff so conducted himself towards the parties to these securities, thus amounting to 4673*l*., that his mortgage, though prior in point of date, would be postponed to theirs. He had actively assisted Lewis in

obtaining the loans from James and Barton, and neither to them, nor afterwards to George Wathen, did he communicate the fact of the existence of his mortgage of September, 1839, of which George Wathen had no notice till a few days before the institution of this suit, on the 19th of March, 1843.

Upon the completion of the purchase by Lewis in January, 1842, the title-deeds were all handed over to Messrs. Wathen, Bassett, & Gurney, as solicitors of Lewis, and they claim a lien on those deeds against the plaintiff for the amount of their bills of costs against Lewis; and whether this claim is valid is the point we have to decide.

Sir JAMES WIGRAM decreed against the lien; and against his decision the solicitors appealed.

Mr. Rolfe, Mr. Follett, and Mr. Bazalgette, in support of the appeal. — In the first place, the respondent has neither legal estate nor possession of the title-deeds, and has no equity to take them out of the hands of the appellants who acquired a lien upon them for valuable consideration without notice of the respondent's charge. They advanced their money and gave their services upon the faith of * the lien, and without notice of any thing to defeat * 19 it. Cases may be cited to show that the solicitor of a tenant for life, or of the owner of a partial interest, has no lien on the property or the deeds, which he has received from his client, beyond the extent of his client's estate, and in that sense it may be said that the lien of the solicitor does not extend beyond the interest of his client. But the proposition does not apply to this case, for the solicitor of a tenant in fee having his client's deeds has by means of them a lien upon the fee. Moreover, the Vice-Chancellor did not advert to the distinction between the title to the deeds and the title to the estate. The legal title of the mortgagor to his deeds was assumed as clear by the Court of Queen's Bench in *Davies v. Vernon*, (a) in which Lord DENMAN, in giving the judgment of the Court, says (speaking of a mortgage): "Now that conveyance of 1833 is silent as to the deeds, and though it be a mortgage in fee, yet, if the deeds remained with the mortgagors, they might lawfully retain them in respect of their equity of redemption as against the mortgagee." And in *Wiseman v. West-*

(a) 6 Q. B. 443.

land (a) a mortgagee who had not obtained the title-deeds, sought to foreclose the mortgagor, and an equitable mortgagee, to whom, subsequently to the plaintiff's mortgage, the deeds had been delivered, and prayed that the deeds might be given up. The Court, however, not only refused so to order, but declared by the decree that the prior legal mortgagee had no title to have the deeds delivered up, the Lord Chief Baron observing, however, that it might have been otherwise if there had been a special contract for the delivery of the deeds. These cases show that a mortgagor is, in the absence of special stipulation, the owner of the deeds, * 20 and remains so until * the mortgagee gets them, and may give a good lien upon the deeds as against a mortgagee, and especially as against a mortgagee who has not the legal estate.

Molesworth v. Robins, (b) *Smith v. Chichester*, (c) and *Blunden v. Desart*, (d) may be cited on the other side, but are inapplicable to the present case. In *Smith v. Chichester* the deposited lease recited the former lease, and was held to be a graft upon it, and subject to the mortgage, and the mortgagee had the legal estate. In *Blunden v. Desart* the prior incumbrancer was a judgment creditor, and had a title independently of any possession of title-deeds; and Sir EDWARD SUGDEN said: "the solicitor's lien can hardly in any case out of this Court be rendered available against a judgment creditor, and the Court must follow the legal rule." In *Molesworth v. Robins* the estate descended to an heir, subject to a charge in which the heir was partially interested, and all that was there decided was, that the heir's solicitor had no lien beyond the heir's interest in the charge. In this case when the mortgage was made, Lewis had no title except a contract for a sale of an equity of redemption; the deeds never came in his possession, but passed directly into the hands of the solicitors, so as not to let in the respondent's incumbrance. They would naturally take care that this should be the case, knowing that they had incurred much expense with respect to these transactions.

In the next place the respondent's conduct of itself, and independently of the general question, has not been such as to * 21 entitle him to priority over the solicitor's * lien. He permitted the mortgagor's solicitors to get possession of the deeds

(a) 1 You. & J. 117.

(c) 2 Dru. & War. 393.

(b) 2 Jones & Lat. 358.

(d) 2 Dru. & War. 405.

at the very time when he knew that the solicitors were engaged in extensive transactions for the mortgagor, for the costs of which they would look to the deeds as a security, and yet he never intimated to them that he claimed in respect of any incumbrance which would interfere with their right of lien. He allowed them to expend their money and their labour in completing the conveyance of which he now desires to have the advantage, leaving them without any means of obtaining repayment or compensation for their trouble. In *Bernard v. Drought*, (a) even an annuitant who permitted the grantor to retain the title-deeds of the estate on which the annuity was secured, was held to have no right as against the lien of the solicitor of the grantor.

As regards the costs of the conveyance, at all events, which was as much for the respondent's benefit as for that of the mortgagor, the solicitors must be entitled to claim a lien as against him.

The only remaining question is, whether the appellants' security is affected by the change which has taken place in their firm by the accession to it of Mr. Bassett. We submit that it is not, and that the case of *In re Forshaw* (b) ought not to be followed.

The Solicitor-General and *Mr. Bevir*, for the respondents.

— *Molesworth v. Robins*, (c) and the other cases before * Sir * 22 E. SUGDEN which have been referred to, are directly in point, and cannot be distinguished by the circumstances relied upon for that purpose. The *dictum* cited from *Davies v. Vernon*, (d) must have had reference to the facts of the case, and could not have been intended to throw doubt on principles which are well established. With respect to *Bernard v. Drought*, (e) the authority of that case is doubted by Sir E. SUGDEN in *Smith v. Chichester*. (g) There is no evidence in this case that the plaintiff knew that the deeds were in the hands of the appellants. He might consistently with all the facts have supposed that the deeds went directly to the hands of Messrs. James & Barton, or, as is generally the case, that the solicitors had taken care to be paid out of the mortgage money; and this observation applies to the costs of the conveyance, which there is no ground for distinguishing from the rest.

(a) 1 Moll. 38.

(b) 16 Sim. 121.

(c) 2 Jones & Lat. 358.

(d) 6 Q. B. 443.

(e) 1 Moll. 38.

(g) 2 Dru. & War. 399.

With regard to the other point, *In re Forshaw* (a) expressly applies, and has never been overruled.

They also referred to *Allen v. Knight*, (b) *Mangles v. Dixon*, (c) *Hooper v. Ramsbottom*, (d) and *Philips v. Robinson*. (e)

Mr. Bazalgette, in reply.

November 26.

THE LORD JUSTICE LORD CRANWORTH on this day delivered the judgment of the Court, and after stating the facts, nearly in the same words in which they are detailed above, proceeded as follows:—

* 23 The argument for the appellants divided itself into * three heads: first, it was contended that, independently of any special circumstances, the lien of the solicitor must prevail; secondly, if this were not so, still that here there were circumstances which would give such a lien independently of any general right; and thirdly, it was argued that, even if there is no lien for the general costs due to the solicitor, still there is such a lien for the costs of and incidental to the procuring the conveyance.

On the first point we think it clear that no such lien as that contended for exists. The general lien of a solicitor is merely a right to keep back from his client the deeds and papers, which he holds as solicitor, until his bill of costs is satisfied. It is a right derived entirely through the client, and therefore, on the most obvious principles of justice, cannot go beyond the right of the client himself. If the client's right to the deeds which came to the hands of the solicitor is absolute, so will be the right of the solicitor. If the deeds in the hands of the client are subject to any rights outstanding in third parties, such rights will follow them into the hands of the solicitor. These consequences flow so immediately from the nature of the relation subsisting between the client and his solicitor, that, even independently of authority, we should have felt bound by the principles on which they depend. But we have the most ample authority in support of the view we take on this part of the case, in the three cases before Sir E. SUGDEN, so

(a) 16 Sim. 121.

(b) 5 Hare, 272.

(c) 1 Mac. & G. 497.

(d) 6 Taunt. 12.

(e) 4 Bing. 106.

much dwelt on in the argument. We allude to the cases of *Smith v. Chichester*, (a) *Blunden v. Desart*, (b) *Molesworth v. Robins*. (c) In the last of these cases it was expressly decided, that the claim of a party having an equitable right against *the * 24 client, must prevail against the solicitor, into whose hands the deeds had come after such equitable right had arisen. Indeed, the principle is obviously the same, whether the right affecting the client's interest is legal or equitable. No man, as was stated by Sir E. SUDGEN in his judgment, can give a lien to his solicitor of a higher nature than the interest he himself has in the deeds. Applying then these principles to the facts of the present case, it appears to us clear, that (laying aside all consideration of particular conduct) the solicitor did not, on the completion of the contract, acquire any lien on the deeds against the plaintiff. If, on the completion of the contract and execution of the conveyance in January, 1842, the title-deeds had been all handed over to Lewis himself and not to his solicitors, he would then have had them, subject to an equitable claim, on the part of the plaintiff, as mortgagee by virtue of his mortgage of September, 1839; and if Lewis had then put them into the hands of his solicitors, they could only have held them subject to the same rights as had attached on them in the hands of Lewis. It can make no difference, that instead of coming, first, into the hands of Lewis, and from him to the solicitors, they were at once handed over by the vendors to the solicitors. For the solicitors, in so obtaining them, obtained them, not by any title paramount to that of their client, but as his agents, and of course with all the liabilities which would have attached on them if they had passed first into the hands of the client, and from him to the solicitors.

This disposes of the first head of the argument. But then it was said, secondly, that whatever may be the general doctrine, here the conduct of the plaintiff was such as to preclude him from insisting on his title, against the lien of the solicitors of Lewis. But we can *discover nothing whatever in the * 25 plaintiff's conduct to warrant such a proposition. When the plaintiff advanced his money and obtained his mortgage deed, in September, 1839, he of course employed his own solicitor to act for him. All which can be alleged against him by the solicitors of

(a) 2 Dru. & War. 393. (b) 2 Dru. & War. 405. (c) 2 Jones & Lat. 358.

Lewis, the mortgagee, is, that he did not inform them of his security. But he was under no obligation to give them any such information, nor was it in the ordinary course of business that he should do so. There is no suggestion that he meant or wished to mislead them. There was nothing to suggest to his mind that it could be of importance to the solicitors that he should give them notice of his security. Cases may undoubtedly occur, in which parties, by standing by and remaining silent, may give to others rights against them, in the same way as if they had been active in making representations; but that can only be when it has been the duty of the party not to be silent, or when the party remaining silent might reasonably infer that such silence would be taken by others as sanctioning a particular course of conduct. No such circumstance exists here. The conduct of the plaintiff, for aught, at least, that appears, was just what might be expected from a man intending to deal with perfect fairness. He became mortgagee, employing his own solicitor, and took it for granted that the mortgagor and his solicitor would settle their own rights among themselves. There does not, therefore, appear to us to be any thing in the conduct of the plaintiff depriving him of his ordinary rights.

The only remaining question is on the point, whether the solicitors may not have a lien against the plaintiff, though not for their whole demand on Lewis, yet for so much as relates to the obtaining the conveyance of the Lyppiatt estate from the * 26 vendors. As to this the * argument was, that these costs were incurred for the common benefit of the plaintiff and Lewis, and so that the lien of the solicitors ought to prevail against both the one and the other. On this minor point, Lord Justice KNIGHT BRUCE entertains some doubt, and I can therefore express my own opinion only. In my opinion these costs do not differ from the rest. I think the solicitors have no lien against the plaintiff for the costs of obtaining the conveyance, any more than for any other part of their bill.

The lien of the solicitor is a right to retain deeds as a mode of enforcing payment of a debt due by the party whose deeds are retained. It is essentially a right arising between the party employed and his employer. The right when once constituted, may, under circumstances, prevail in favour of the solicitor, not only against his employer, but also against parties deriving title

under his employer. But it always originates from the relation of client and attorney; *i. e.*, employer and employed. Taking this to be a correct view of the law, the question here is, who employed Messrs. Wathen, Bassett, & Gurney to obtain and perfect the conveyance. No doubt when they had completed the conveyance, their services enured to the benefit, not only of Lewis the purchaser, but also of the plaintiff, who claimed under him. But I do not think this is material. If the case could be brought to the point that the solicitors were acting not only for Lewis, but also for the plaintiff, then neither Lewis nor the plaintiff could take the deeds of conveyance out of their hands without paying them the full amount of their costs incurred in preparing and perfecting them. But this certainly was not so. The solicitors were the solicitors of Lewis, and of him only. He alone employed them. He alone was liable to pay them for their services, and against him alone, therefore, was their lien * available when * 27 the deeds came into their hands. Their right is, as I think, precisely what it would have been, if, on the final settlement of the purchase and execution of the deeds, the vendors had delivered the deeds to Lewis and he had handed them over to the solicitors. In such a case the right of the solicitors would be only, as I think, to hold the deeds subject to all the rights, legal and equitable, affecting them in the hands of Lewis; and therefore, their right was, as I conceive, subject to a prior right in the plaintiff in respect of his mortgage of September, 1839. I do not think there is any distinction between these deeds and the other deeds in the hands of the solicitors.

The result therefore is, that the decision of Sir JAMES WIGRAM will be affirmed in every respect, and this appeal must therefore be dismissed. And Lord Justice KNIGHT BRUCE concurs with me in thinking that the costs of the appeal must in that case follow the event, and so be paid by the appellants, because the appeal reproducing litigation on points, manifestly, in the opinion of both members of this Court, properly decided by the Vice-Chancellor, has taken a range widely beyond the narrow and restricted part of the case, on which alone my learned brother entertains any doubt.

It is unnecessary to say that the question raised at the bar, whether, if the lien had been established, it would have extended to the debts due to all the successive firms, or only to that due to

the last firm; whether, in short, according to the doctrine laid down in *In re Forshaw*, (a) the lien of a solicitor is affected by his taking a partner, does not arise in this case. On that point we express no opinion.

1851. Before the LORDS JUSTICES. November 7, 8, 25.

On March 4, 1811, an agreement was entered into for the purchase of freehold land for 6300*l.*, to be paid on the 13th of May, 1811, and the purchasers were immediately put into possession..

In 1827, the purchaser, before any conveyance was made to him, and before he had paid any part of the purchase-money, died, having devised the lands to trustees. The trustees disclaimed, and others were appointed by the Court of Chancery. In 1834, the attorney of these trustees wrote to the assignees of the vendor (who had become bankrupt), stating that the purchase-money was ready to be paid on the purchase being completed. On a bill filed by the assignees in 1844, to enforce the lien, to which the Statute of Limitations, 3 & 4 Will. 4, c. 27, was set up as a defence by answer: *Held*—

- 1st. That the trustees were persons by whom the purchase-money was payable within the meaning of the Statute of Limitations, 3 & 4 Will. 4, c. 27, § 40.
- 2d. That the acknowledgment of their attorney in 1834 was sufficient within the meaning of the exception in the Act to withdraw the case from its operation, and, for this purpose, to bind the *cestuis que trustent*, although the trustees were appointed not by or under any powers contained in the will, but by the Court of Chancery.²
- 3d. That the answers claiming the benefit of the statute must be considered as alleging that no acknowledgment of the right to receive the money had been given or signed by the person by whom it was payable, or his agent; and that, therefore, although the bill did not allege any acknowledgment to have been made, the plaintiffs were entitled to put the acknowledgment in evidence on an appeal, although it was not read or proved at the original hearing.
- 4th. That this only applied to the trustees who had admitted the agency of the attorney, but that, as against other defendants who had not made a similar admission, the assignees were entitled to an inquiry as to any acknowledgment having been given.³

THE object of this suit was to establish a lien for a sum of 6499*l.* 10*s.* upon certain lands to which the defendants were en-

(a) 16 Sim. 121.

¹ S. C., 5 De G., M. & G. 735; 7 Hare, 1.

² See *Fordham v. Wallis*, 10 Hare, 217.

³ See 1 Lead. Cas. in Eq. (3d Am. ed.) 362, [270].

titled, situate at Bawtry, in the county of York. The material facts of the case were the following : —

Joseph Marris died about the year 1808, having by his will devised his real estates to Thomas Marris in fee, charged with the payment of his debts. By an agreement in writing, dated the 4th of March, 1811, Thomas Marris agreed to sell to John Stephenson the lands at Bawtry, which were parcel of the lands devised by the will of Joseph Marris, comprising about 151 * acres, in consideration of a sum of 6300*l.*, to be paid * 29 on the 13th of May then next. And immediately on the execution of the agreement, John Stephenson was let into possession, though no part of the purchase-money was paid.

In January, 1812, a commission of bankruptcy issued against Thomas Marris and his then partner Richard Nicholson, and the present plaintiffs were their assignees.

In October, 1812, John Stephenson agreed to sell to Cornelius Sanders a part of the lands purchased from Thomas Marris, and thereupon Sanders was let into possession, and he and those who derived title under him had ever since remained in possession of this part.

John Stephenson, by his will dated the 18th day of December, 1817, devised to two trustees, their heirs and assigns, all and singular his real estates, comprising the above-mentioned lands and hereditaments contracted to be purchased by him, and also all his personal estate and effects, upon trust, if they should think fit, to sell the same, and after payment of his debts to invest the sum of 1000*l.*, and pay the interest thereof to his wife Elizabeth Stephenson, one of the defendants, for her life and after payment of a legacy or sum of 5*l.* to his eldest son John Stephenson (who died in the testator's lifetime), to pay and apply the residue of the moneys to arise from such sale, and also the said sum of 1000*l.* after his wife's death, unto, between, and among his seven children therein named, and any others his child or children who might be living or born in due time after his decease, as * tenants * 30 in common, with benefit of survivorship. John Stephenson died in 1827, without having revoked or altered his will, and the two trustees named in the will having refused to accept the trusts thereof, the defendants Stephenson and Read were duly appointed trustees in their place, by virtue of a decree of this Court, in

a suit instituted for the purpose by the parties interested under the will.

The present bill was filed by the assignees of Marris and Nicholson against Stephenson and Read, and the parties beneficially interested under the will of John Stephenson, and also against the representatives of Sanders, for the purpose of establishing a lien on the property comprised in the original contract of the 4th of March, 1811; and it prayed, that it might be declared that the plaintiffs had a lien upon the hereditaments and premises comprised in the agreement of the 4th day of March, 1811, for the sum of 6499*l.* 18*s.*, with interest thereon at 4*l.* per cent per annum from the 13th day of May, 1811, and that the defendants Elizabeth Stephenson, Joseph Stephenson, and William Read and Francis Sanders, and William Brocklehurst Stonehouse and Elizabeth his wife, or some or one of them, might be ordered to pay the same to the plaintiffs, as the Court should think fit, at an early day, to be named for that purpose; and in case the said defendants should not pay the same to the plaintiffs, then that the same might be raised by sale or mortgage of the said hereditaments and premises, and for a receiver.

The trustees, by their answer, said they did not know, of their own knowledge, but believed it to be true, that, at * 31 the time in the bill in that behalf * mentioned, Thomas Marris did agree to sell to John Stephenson some portions (to wit), such portions as in the contract in the bill stated appeared, of the real estate to which he had become entitled under the will of Joseph Marris; but they said they had never seen the contract in the bill in that behalf stated, and they expressly claimed the benefit of the production thereof by the plaintiffs: however, they believed, though, for the reasons aforesaid, they could not admit it to be true, that such an agreement as in the bill in that behalf mentioned was entered into between the said Thomas Marris and John Stephenson, and that the same was of such date and in such words and figures, and of or to such purport and effect as in the said bill in that behalf mentioned and set forth, so far as the same was therein set forth; but for their greater certainty they craved leave to refer to such contract. In answer to the interrogatory as to documents, they said that divers deeds and documents relating to the estate of their testator had been

and were deposited in Court in a suit of *Feary and Others v. Stephenson and Others*, and amongst the documents scheduled was the draft of the schedule of the documents so deposited. They admitted correspondence had also been had and passed by and between Mr. Cartwright, their solicitor, and Mr. Holgate, the solicitor of the plaintiffs, in reference to some of the matters in question, and which they submitted it was unimportant in the suit more particularly to specify, and in fact they said that the same was as they submitted immaterial; and that they abstained therefrom, inasmuch as the same extended over a period of many years, and as the specification thereof would occasion considerable trouble and labour, and as the plaintiffs had by their solicitors the particulars thereof. They submitted to the judgment of the Court whether the right and title of the * plaintiffs to the relief * 32 sought by the bill in respect of such lien or otherwise as therein mentioned, was not barred by the great laches of the plaintiffs apparent in the cause; and by the great delay and lapse of time which had occurred in putting their claim in suit, and whether the same was not barred by the statute for the limitation of actions and suits.

The *cestuis que trustent* under the will put in their answers, also claiming the benefit of the Statute of Limitations, but not containing any statement or admission as to Mr. Cartwright being the solicitor of the trustees.

The sub-purchaser did not by his answer claim the benefit of the Statute of Limitations.

The case came on to be heard before Vice-Chancellor WIGRAM, in March, 1848, and is reported in the 7th vol. of Mr. Hare's Reports, p. 1. A decree was then made (but was not drawn up till February, 1850), ordering the bill to be retained for twelve months, with liberty for the surviving plaintiff to proceed at law, and, in default of the plaintiff's proceeding at law, for the dismissal of the bill with costs.

After judgment had been given, but before the decree had been drawn up, the plaintiff discovered among the papers of the bankrupts several letters which he was advised amounted to acknowledgments, so as to exclude the operation of the Statute of Limitations.

One of these letters was written from Mr. Cartwright, * the * 33

solicitor of the trustees of Mr. Stephenson's will, to the solicitor of the assignees, and was as follows :—

“ To Messrs. Joseph Toft and John Chapman, assignees of the estate and effects of Thomas Marris, a bankrupt, and to Mr. Patteson Holgate, their attorney.

“ As attorney for and on behalf of William Read, of Epworth, in the county of Lincoln, draper, and Joseph Stephenson, of Everton, in the county of Nottingham, farmer, the person appointed by the High Court of Chancery to carry into execution the trusts of the last will and testament of John Stephenson, late of Craiselound, in the parish of Haxey, and said county of Lincoln, land-surveyor, deceased, I do hereby give you notice that the amount of the purchase-money for all those several pieces or parcels of freehold and copyhold land situate in the parish of Owston, in the said county of Lincoln, mentioned in a certain agreement in writing bearing date the 4th day of March, 1811, and made between the said Thomas Marris of the one part, and the said John Stephenson of the other part, and all interest due in respect of the said purchase-money, or rent in respect of the said land, are ready to be paid, and that the amount of such purchase-money and interest or rent is lying at banker's interest; and as attorney as aforesaid, I further give you notice that the said William Read and Joseph Stephenson are willing to invest, at your expense, the amount of the said purchase-money and interest or rent in any security or securities to be approved of by them and you, for the express purpose of completing the purchase under the said agreement; and as attorney I further give you notice, that unless the said purchase be immediately completed, or the said investment be made, the said William Read and Joseph Stephenson will only allow banker's interest on the amount * of the purchase-money from the date hereof to the time of completion of the said purchase. Witness my hand this 13th day of March, 1834. Frederick Henry Cartwright.”

A petition was thereupon presented for leave to file a supplemental bill for the purpose of bringing before the Court the new evidence.

The petition came on to be heard before Vice-Chancellor WIGRAM on the 21st of July, 1849, and was dismissed with costs.

The plaintiff appealed from the decree and from the order upon the petition.

The appeal now came on to be heard.

Mr. Lee, Mr. Glasse, and Mr. Fooks for the appellants, tendered in evidence the notice of the 13th March, 1834, among other documents which had been discovered since the decree, (a) and which were proved *vidé voce* under an order.

Mr. Teed and Mr. Rogers for the trustees objected to the admissibility of the document as not having been produced at the original hearing, and as not being put in issue by the bill. They contended that the object of the evidence was, in effect, to establish a new promise in reply to a plea of the Statute of Limitations, and that this could not be done without putting the fact of a new promise in issue.

THE LORD JUSTICE KNIGHT BRUCE. — The question is, whether the plaintiff is entitled to * read this document in * 35 evidence against the defendants Read and Stephenson. It is quite immaterial whether it was produced or not at the original hearing. It does not require interrogatories to be exhibited to render it admissible. The answer of these defendants admits that *Mr. Cartwright*, by whom this document purports to be written, acted as their solicitor. The document has been proved *vidé voce* at the hearing, under an order which was well obtained, and it is shown to be in the handwriting of *Mr. Cartwright*. Does it then go to establish any matter in issue? If there had been a plain or complete admission of the contract in the answer, the document might possibly have been superfluous, and inadmissible in evidence. But there is no admission in the answer as to the contract, except an admission calling on the plaintiff to give evidence. As evidence of the contract, therefore, the document is admissible. What the effect of its admission may be is another matter.

THE LORD JUSTICE LORD CRANWORTH. — The document is evidence of a contract put in issue in the cause; and I think it admissible as affording the means of proving the contract stated in the bill.

(a) See *Dashwood v. Lord Bulkeley*, 10 Ves. 237.

The document was then admitted in evidence, and the general arguments were proceeded with.

Mr. Lee, Mr. Glasse, and Mr. Fooks, for the plaintiff, contended that the document if admitted in evidence for any purpose was sufficient to exclude the operation of the Statute of Limitations.

They further contended that the defendants, who stated * 36 upon their answer that the plaintiff had not deduced a * good title before the period from which the statute would operate, could not rely on the statute, inasmuch as the plaintiff's right to recover the purchase-money could not arise until he had made a good title. Until that time the vendors had no "present right" to receive the money.

They also referred to *Burrell v. Egremont*, (a) and *Grant v. Ellis*; (b) and argued that the statute was one the provisions of which must be construed in a restricted sense, and not literally.

They further argued that even if the debt should be barred, the lien might remain; and they referred to the case of a Welsh mortgage decided in *Howell v. Price*, (c) and to *Bulwer v. Astley*. (d)

Another argument was founded on *Mestaer v. Gillespie*, (e) as showing that the Court will not allow a statute to be made the means of committing a fraud.

They also relied upon the proceedings in former suits as excluding the operation of the statute.

It is not requisite to do more than indicate these topics of argument, the decision having turned on the acknowledgment contained in the notice of the 13th March, 1834.

Mr. Teed and Mr. Rogers for the trustees.— Although * 37 the letter has been admitted in evidence of * the contract, it cannot be regarded as evidence of an acknowledgment so as to exclude the operation of the statute. That is an issue which the defendants were entitled to have raised distinctly by the bill, in order that they might address their attention to the circumstances attending the alleged acknowledgment, and which may have prevented it from having the effect ascribed to it. The present stat-

(a) 7 Beav. 205.

(d) 1 Phil. 422.

(b) 9 M. & W. 113.

(e) 11 Ves. 621, 640.

(c) Preced. in Ch. 423, 477.

ute bars the right, and not only the remedy. The plaintiffs now therefore seek to recover by a new title not alleged by their bill.

THE LORD JUSTICE LORD CRANWORTH.—The defence by the answer cannot be more favourably construed for the defendants than by giving them the same benefit as if they had formally pleaded the statute. If they had pleaded it he must have averred that no acknowledgment of the right to the money had been given in writing, signed by the persons by whom the same was payable, or their agent, to the persons entitled thereto or their agent; must not this averment, therefore, be considered to form part of the answer? And does it not put in issue the fact for the very purpose of establishing which the letter is produced?

Mr. Teed.—There is no one in the present case by whom the money was payable. The trustees were not liable to pay it, and therefore the acknowledgment of their agent does not come within the words of the statute.

THE LORD JUSTICE LORD CRANWORTH.—Suppose the trustees had paid interest, would not that have excluded the operation of the statute?

Mr. Willcock, Mr. Goodeve, Mr. Osborne, and Mr. Smythe, for other defendants.—The trustees could not *in * 38 the manner suggested have prejudiced their *cestuis que trustent* by such a proceeding. They have no powers except such as they derive from the will, and this is not among them. Besides, they are not the trustees in whom the testator's confidence was placed, but strangers appointed by the Court.

Mr. Kenyon Parker, Mr. Faber, and Mr. Lean appeared for other defendants.

Mr. Lee replied.

Cur. adv. vult.

November 25.

THE LORD JUSTICE LORD CRANWORTH.—There could be no doubt as to the right of the plaintiffs to the relief which they seek, if they had proceeded within a reasonable time after the date of the

contract. The question in the cause is, whether, by not proceeding more promptly, they have forfeited that right. The defendants Stephenson and Read, the trustees, by their answer say they submit to the Court whether the right of the plaintiffs to the relief sought by the bill is not barred by laches and by lapse of time; and whether the same is not barred by the statute for the limitations of actions and suits.

Of the persons entitled beneficially under the will of John Stephenson, some do and some do not insist on the Statute of Limitations.

The parties claiming under Sanders do not insist on the statute, but say they are ready to pay to Stephenson's representatives * 39 the money due to them, in * respect of the sub-sale to Sanders, on having a good title made to them.

On the hearing of the cause before Vice-Chancellor WIGRAM, he held that the answers sufficiently set up and insisted on the Statute of Limitations; and that the 40th section of the Statute 3 & 4 Will. 4, c. 27, expressly applied to the case, and presented a complete bar to the relief sought by the bill, unless the plaintiff could by ejectment establish a legal title to possession of the lands in question.

The 40th section is as follows:—

[His Lordship read it.]

And the Vice-Chancellor by his decree ordered [his Lordship read the decree].

In the argument of the case before the Vice-Chancellor, it was contended that, even admitting the 40th section to apply to the present case, still there was a variety of circumstances, which made the statute inapplicable.

His Honor decreed against those arguments; and we do not feel ourselves called on to consider that part of the case, because, assuming the view taken by his Honor to have been perfectly correct, as to which we express no opinion whatever, yet, on the hearing before us, there was evidence not before the Court below, which puts the case arising from the statute wholly out of the question. That evidence is as follows: The defendants Stephenson and Read, the trustees, by their answer state, that correspondence passed between Mr. Cartwright, their solicitor, and Mr.

Holgate, the solicitor of the plaintiffs, in reference to some of the matters in question.

* At the hearing before us, one of the letters constituting * 40 that correspondence was proved and read in evidence, being a letter from Mr. Cartwright, as solicitor of Read and Stephenson, to Holgate, as solicitor for the plaintiffs.

The letter is dated the 13th of March, 1884, and is as follows : —

[His Lordship read it.]

Now this letter appears to us to come precisely within the very terms of the 40th section, and to be a document taking the case out of the operation of the statute. It is an acknowledgment in writing of the right to the money in question, signed by the agent of the persons by whom it was payable, and given to the agent of the person entitled thereto, and so within the express words of the clause. It was indeed attempted to be contended before us, though but faintly, that Read and Stephenson were not persons by whom the money was payable, for that no one was liable to pay the money but the legal personal representatives of Stephenson, the purchaser. Read and Stephenson, it was said, though entitled to the land upon which the plaintiffs sought to enforce a lien, were not personally liable to any thing. But this argument evidently proceeds on an erroneous interpretation of the statute. The person designated in the 40th section as the person by whom the money is payable, must evidently mean, in the case of a claim by way of equitable lien, the person entitled to the land on which the charge is sought to be fixed. The money is payable by him, in the only sense in which it is payable by any one. Unless he pays it, he will lose his land ; and it is obviously in that sense that the statute in such a case speaks of the money as payable.

* It was further contended, that this acknowledgment by * 41 Read and Stephenson ought not to affect the *cestuis que trustent*. But this again is a mistake. The acknowledgment of the executor, in an ordinary case, will keep a debt alive against all parties beneficially interested ;¹ and the same principle prevails in the case of devisees of real estate in trust for payment of debts, as was decided by Sir L. SHADWELL in *Lord St. John v. Boughton*. (a)

(a) 9 Sim. 219. [See Sugden V. & P. (14th Eng. ed.) 482, 487.]

¹ See Briggs v. Wilson, 5 De G., M. & G. 12 and note (2).

We are aware that Read and Stephenson were not the trustees named in Stephenson's will; but that appears to us to be immaterial. They were appointed trustees by a decree of this Court, in the place of the original trustees, and have ever since been in possession in that character.

This letter of Mr. Cartwright thus displaces altogether the bar of the statute so far as respects Read and Stephenson, the trustees. But though conclusive as against them, yet the other defendants, who have insisted on the statute, are not, in the present state of the record, bound by it; for, as against them, there is no legitimate proof that Cartwright, when he wrote the letter, was the agent of the trustees, and these other defendants have a right to insist on this proof being properly made: and even as against Read and Stephenson themselves, the document, though, as we stated at the hearing, clearly receivable in evidence, is not specifically referred to in the bill. It is therefore not unreasonable that an opportunity should be given to them, as well as to the other defendants, of offering any further proof touching the genuineness and nature of the paper. The only course therefore open to us for the present is,

to direct an inquiry on this point; *i. e.*, an inquiry whether
 * 42 * any acknowledgment in writing of the right to the money, payable by virtue of the contract of the 4th of March, 1811, was ever and when given by Read and Stephenson, or their agent, to the plaintiffs or their agent.

There can be little doubt as to what will be the result of such an inquiry, and, assuming it to be established that Cartwright did write the letter of the 13th of March, 1834, as agent and by the authority of Read and Stephenson, then the bar of the statute will be removed, and the plaintiffs will clearly be entitled to relief.

No further inquiry can in such a case be of any advantage. But, with a view to the possibility of a report as to the document unfavourable to the plaintiffs, we are willing, if any party desires it, to direct a further inquiry in conformity to what was suggested at the bar, as giving rise to a possible equity, even against the statute; namely, by whom the estate comprised in the contract of 1811, and the rents and profits thereof, have been held, received, and applied since the date thereof and under what circumstances, and whether any and what payment or payments has or have been ever and when made, and by and to whom, for or in respect of the purchase-money, in the said contract mentioned, or the interest

thereof. And whether the title of the vendors has been ever and when, and under what circumstances, accepted. But any such inquiry must be made at the risk of costs to be paid by the party desiring it, and we must not be understood as giving any opinion as to its importance.

There must be a general liberty to the Master to state special circumstances and of course further directions, and the costs will be reserved.

* In the Matter of CLARK.

* 43

1851. November 14 & 17. Before the LORDS JUSTICES.

Under the Solicitors Act, items struck out of a bill of costs on taxation, as not chargeable against the person to whom the bill is delivered, must be taken into account in determining the costs of taxation.

An attorney delivered a bill of costs to a client, comprising the costs of an unsuccessful and desperate action of replevin, which the attorney had brought, not in the name of the client, but (as the attorney alleged) by the client's direction.

The evidence adduced to prove this allegation was held by the Court to be insufficient.¹

Held, that the item could not be allowed; and, *semble*, that it could not be enough for the attorney to prove the direction to have been given without also proving that he had properly advised the client as to the desperate character of the proceeding.

Semble, that it was within the functions of the taxing officer to require proof of such direction, and of such advice having been given, before he allowed an item in respect of the action.

Where the Court concurred in opinion upon the effect of the evidence as it stood, and only differed upon the question whether the appellant should have an opportunity of proceeding at law, *held* that the appeal ought to be dismissed with costs.

Quære how far an attorney is justified, as between him and his client, by the opinion of counsel in prosecuting an action which is unsuccessful, and which the Court considers to have been groundless.

THIS was an appeal of a solicitor from an order of the Master of the Rolls (reported in the 13th vol. of Mr. Beavan's Reports, p. 173). The order appealed from confirmed a decision of the taxing master, who had disallowed a sum of 73*l.* 14*s.* 6*d.* being

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 306, 307.

the costs of an action of replevin, and had charged the appellant with a sum of 243*l.* 10*s.* in respect of moneys received by him, without allowing him to set off a sum of 184*l.* 7*s.* 10*d.* in respect of certain bills of costs, to the payment of which the appellant alleged the sums received had been directed or agreed to be appropriated. The taxing master had also directed the appellant to pay the costs of the taxation, more than one-sixth having been taken off. (a)

* 44 The bill of costs in question was delivered on the * 26th of June, 1847, by the appellant to Mr. Brown, the respondent, in respect of business which the appellant alleged had been done for two ladies since deceased, named Martha Jeffery and Charlotte Brown, of both of whom the respondent was the legal personal representative.

The action of replevin was commenced in July, 1841, and ended in December, 1842, and was brought in the name of one Henry Jeffery; but the appellant alleged that it was brought by the direction of Martha Jeffery and Charlotte Brown, then Charlotte Jeffery, or one of them, and that they or one of them undertook to pay the costs relating to the same. The action failed, and there was no evidence that the appellant had explained to either of the ladies the improbability of its success.

Upon the question of the receipt of the 242*l.* 10*s.*, and the alleged appropriation of a portion of it to the payment of the bill of costs for 187*l.* 7*s.* 10*d.*, the evidence was not distinct or precise.

Mr. Rolt and *Mr. Miller*, in support of the appeal. — First, there is sufficient evidence of authority to bring the action of replevin. Secondly, the moneys with which the appellant was charged did not come to his hands as the attorney of the two deceased ladies, or either of them; and if they did, the deduction claimed out of them ought to have been allowed. Thirdly, the order is wrong in directing the appellant to pay the costs of taxation; for the bill, so far as it was allowed, was not reduced by one-sixth. The reduction arises from the total disallowance of certain items, on the ground that the respondent was not liable to pay them, and not in respect of any overcharge. This is not a reduction within

(a) See the taxing master's certificate, 13 Beav. 180.

* the meaning of the Act: *White v. Milner*, (a) *Mills v. Rivett*, (b) *Newton v. Harland*. (c) If the recent Act had been intended to introduce any alteration in this respect, that intention would have been indicated in clearer terms than any that can be found in it. (d)

THE LORD JUSTICE KNIGHT BRUCE. — With regard to the costs of taxation, we decline expressing any opinion how we should have dealt with them if the recent statute had not passed. We think the statute reasonably susceptible of the construction put upon it by the taxing masters unanimously, and by a Judge of great eminence. It seems to us a rational and beneficial construction, and we are not * disposed to dissent from the * 46 decision. We only desire to hear the respondent's counsel on the question whether, considering the conflict of evidence as to the other part of the case, it will not be consonant to justice to permit an action to be brought on admissions.

Mr. Roundell Palmer and *Mr. Southgate*, for the respondent. — The appellant has not entitled himself to such an indulgence, for, upon the whole evidence, it is clear that there was no authority to bring the action of replevin; and if it were not, still he does not even allege that such authority was given after due information

(a) 2 Hen. Bl. 357. (b) 1 Ad. & El. 856. (c) 9 Dowl. 641.

(d) 2 Geo. 2, c. 23, § 23: "And the said respective Courts are hereby authorized to award the costs of such taxations to be paid by the parties according to the event of the taxation of the bill (that is to say), if the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs of the taxation; but if it shall not be less, the Court in their discretion shall charge the attorney or client in regard the reasonableness or unreasonableness of such bills."

6 & 7 Vict. c. 73, § 37: "And in case any such reference as aforesaid shall be made upon the application of the party chargeable with such bill, or upon the application of such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, and the party chargeable with such bill shall attend upon such taxation, the costs of such reference shall, except as hereinafter provided for, be paid according to the event of such taxation; that is to say, if such bill when taxed be less by a sixth part than the bill delivered, sent, or left, then such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall pay such costs; and if such bill when taxed shall not be less by a sixth part than the bill delivered, sent, or left, then the party chargeable with such bill making such application or so attending shall pay such costs."

and advice as to the nature and desperate character of the proceeding. When the action came on, the Court of Law at once said that it was altogether wrong, and it is impossible for any one not to see that it was utterly without foundation. Nothing, therefore, could enable an attorney to charge with the costs of it persons who were not parties to the action, except the most positive proof of, not only of an undertaking on their part to pay the costs, but of their having been properly advised before giving such an undertaking.

LORD CRANWORTH.—Can these questions be raised upon the mere taxation of a bill of costs? Had the taxing master authority to question the soundness of the advice upon which the action was authorized, supposing the authority to be proved?

After some further argument, their lordships requested Mr. Follett, one of the taxing masters, to inform them of the practice in the taxing office in this respect. Mr. Follett attended * 47 their lordships, and * stated that the universal practice of all the taxing masters was to enter into the questions above referred to where the circumstances of the case required it in taxing bills of costs.¹

Mr. Roundell Palmer and Mr. Southgate.—It has been held to be within the taxing master's functions to make the inquiry: *Re Hair*, (a) *Re Bracey*; (b) and the burden of proving the retainer being upon the appellant, he has not made out even a *prima facie* case to justify further investigation. They cited *Pinner v. Knight*, (c) and *Hood v. Phillips*. (d)

Mr. Roll, in reply.

THE LORD JUSTICE KNIGHT BRUCE.—I have my learned brother's permission, in the event (which has happened) of my mind being satisfied at the conclusion of the argument that this appeal ought to be dismissed, to declare that opinion at once. Acting upon that permission I do so. I must say that I have no doubt upon the subject. It is a matter of ordinary occurrence for different minds to

(a) 10 Beav. 187.

(c) 6 Beav. 174.

(b) 8 Beav. 266.

(d) 6 Beav. 176.

¹ *Re Atkinson & Pilgrim*, 26 Beav. 151.

view differently the effect of the same evidence ; and it is possible therefore that my learned brother may not take precisely the same view with myself of the facts of this case.

This is an appeal, on the subject of the taxation of a bill of costs, from a well considered decision of a taxing master, confirmed in all its parts by a most careful and attentive Judge, the taxing master having formerly been a solicitor of the first respectability and extensive practice. With such a concurrence of opinion upon such a question, a Court of Appeal before dissenting * from what has been done ought to be thoroughly convinced * 48 that there is error in the conclusion. Still, whatever may be its respect for the decision, the Court of Appeal, if satisfied that it is erroneous, is bound not to retire from the duty of stating its own opinion and acting upon it.

The first question is as to the costs of the action of replevin which are claimed against Mr. Brown as administrator of his wife and her sister, or of one of them.

Neither the wife nor the sister was a party to the action. *Prima facie*, therefore, neither was liable to pay these costs. But the contention is, that these ladies, or one of them, authorized or directed the action to be brought, or at least contracted to be liable to the costs, and very voluminous and not very consistent evidence has as to this been gone into. The evidence is far from satisfying my mind that either sister authorized or sanctioned the action, or contracted or became liable to pay the costs of it. My impression is that neither did. But assuming for the sake of the argument that both the sisters or either of them had authorized the action or promised to pay the costs, I am of opinion that it was incumbent upon the attorney to show that he had given the ladies proper advice and proper information, and that they were not allowed blindly to give him instructions upon a subject which it was his duty to understand, and not theirs. Now there is no suggestion, and no reason is afforded by the evidence, for believing, that any such advice was ever given. I agree that, in some cases, notwithstanding the impropriety of bringing an action, the client may be liable to pay the costs of it. The client may have untruly or insufficiently informed his attorney upon the facts of the case, or on being informed by his attorney that an action is hopeless, or that a defence is unreasonable, * may say that the proceed- * 49 ings shall, whether wise or unwise, whether of probable or

improbable, certain or uncertain success, go on. In such a case the client may be bound to pay the costs incurred in the proceedings. Here there is no room for such a suggestion. All the circumstances were as well known to the attorney as to the client, probably much better; and assuming that the lady requested the attorney to go on, and said that she would pay, it was the duty of the attorney to tell her that the proceeding was most absurd, and that there was not the slightest chance of success consistently with the rules of law. That is what he ought to have done. That is what there is not the slightest ground for saying that he did. It has been said that an attorney is justified in all cases in acting upon the advice of counsel; and if counsel so far mistake the law as wrongly to advise a proceeding which turns out to be unsuccessful, the attorney is exempt from responsibility. Upon that as a general proposition I desire to say nothing. In this case the advice of the common-law counsel and the special pleader, who were regularly consulted, was against the action. It is said, however, that two gentlemen of the equity bar expressed opinions favourable to it. Now, however out of the ordinary course it may be to act upon the opinion of counsel at the equity bar as to the propriety of commencing an action of replevin, I cannot say that it would be wrong, for no man is competent to conduct business in equity without some, and not a very slight, acquaintance with common law. Therefore, if I were satisfied that the opinions were really given, I might be disposed to give weight to that circumstance. But although I am sure that the gentleman who has spoken to this believes that such opinions were expressed, I think that he was mistaken. I find no charge in the bills of costs in respect of any such opinion. Upon the whole I think that in any possible

* 50 view of the case * no charge can be maintained in respect of the action of replevin.

The only remaining question is as to the sum of 243*l.* 10*s.* This sum was unquestionably the money of these ladies, or of one of them; and I think that the unavoidable inference to be drawn from the evidence is, that the solicitor had notice of this, and became in effect a trustee for the persons or person to whom the money belonged and to whom he thus became, if but equitably, yet directly, indebted. It thus became a proper item in the account between the attorney and these ladies, or one of them, and the burden is upon the attorney to discharge himself from it in the

account. The only evidence which has been adduced for this purpose is of the slightest and most unsatisfactory description. I cannot concur in sending the case to law for the chance of obtaining further evidence on the question of retainer, for my judgment does not proceed on the ground of absence of retainer ; and I think moreover that it is extremely improbable that any adducible evidence has been omitted in this case, which, after having been three years before the Master, has now been twice examined upon appeal. According to the view which I take the order appealed from is wholly right, and the petition must be dismissed. If my learned brother should not concur in the opinion that the appeal should be dismissed with costs, I propose to take time to consider how the costs of the appeal ought to be disposed of.

THE LORD JUSTICE LORD CRANWORTH. — The statute under which we here exercise jurisdiction provides that, in the event of our differing when the Court is constituted as it is at present, the decision of the Court below shall be affirmed. It is unnecessary therefore for me to enter at large into the opinion which * I might * 51 have given. It deserves consideration what in such a case ought to be done on the subject of costs as a general question, and I accede to my learned brother's suggestion that we should take time to consider this point.

In the present case, although we differ in opinion, the difference between us is extremely small. My learned brother feels satisfied upon the evidence that there was no retainer ; and that if there was any, still that the action ought not to have been brought. Now, if I were obliged to say, what, as a jurymen, my conclusion was, I should agree with my learned brother's conclusion on both points, and say that neither the retainer nor the authority to apply the 243*l.* 10*s.* in the manner suggested is made out to my satisfaction. But I confess that I entertain some doubt whether further investigation might not change my opinion, and at least establish the liability of the respondent as regards the costs of the action ; and if I had to act on my own impression, I should say that the most convenient mode of trying the question would be by an action. And as the question of retainer is purely a question of law, I should have thought that the attorney was entitled to have it tried in the ordinary way, and that the legislature did not intend to delegate to an officer of the Court the determination of the ques-

tion whether the attorney should have a right to bring an action. Sitting, therefore, not as a jurymen, but as a Judge I should have said if there is any doubt as to the respondent's liability to pay a part of the bill, let an action be brought as to that part.

It is also said, that the conduct of the attorney has been such as to deprive him of any right to recover even if the retainer * 52 was established. But here again, notwithstanding * the high authority which has been adduced in its favour, I doubt whether the proposition can be sustained that it is within the functions of the taxing officer to inquire what explanation the attorney gave to the client of the nature of the proceedings, and, in default of such explanation appearing to have been given, to strike out the item relating to such proceedings. If that inquiry was within his functions, I think that his conclusion upon the present materials was correct, and that the action was the most absurd action that could have been brought, and necessarily involved immediate defeat and disgrace. If, therefore, I had now as a jurymen to decide this point, I should also decide it against the appellant; and so of the authority to apply the sum of 243*l.* 10*s.* But I should have thought that upon these questions, as well as upon the other, the appellant was entitled to have the decision of a Court of Law. However, the case is one in which I should not have interposed against judgments of so much weight, even if the statute under which we are now exercising jurisdiction had not said that my doubt should avail nothing. And I do not at all regret that the matter has ended as it has.

November 17.

On this day their Lordships dismissed the appeal with costs, saying that they did not mean to decide the general point that costs were to follow the result of the appeal in all cases in which the Court differed; but that in this particular case that appeared to be the correct decision, because the difference of opinion between their Lordships was not as to the correctness of the decision at the Rolls on the materials before the Court, but merely upon the question whether the appellant should be allowed an opportunity for further investigation.

* In the Matter of JOHN YALDEN, a Person of Unsound * 53
Mind ;

And in the Matter of 10 & 11 Vict. c. 96, and of 12 & 13 Vict. c.
74 ;

And in the Matter of the trusts of the Residuary Estate of JOHN
BAKER, deceased.

1851. November 19. Before the LORDS JUSTICES.

A testator bequeathed his residuary personal estate (after a life interest), to his grandson to and for his own use ; but if he should die under twenty-one, without leaving lawful issue, or if he should attain twenty-one and die without leaving issue, and without having disposed of the same by his will, or otherwise, then over. *Held*, upon the construction of the whole will, that in the event (which happened) of the grandson attaining twenty-one, he took an absolute interest.¹

THIS was a petition in lunacy and under the Trustees Relief Act, praying the confirmation of the report of the Master in Lunacy. The questions were, how the costs incurred in the matter of the lunacy should be paid, and whether, under the will and codicils of a testator named John Baker, the lunatic took an estate for life, with a power of disposing of the capital, or an absolute interest. The persons interested under the will, in opposing the latter construction, had come before the Court under the Trustees Relief Act. The questions only related to the residuary personal estate ; but the dispositions of the will relating to the real estate were referred to as assisting in the interpretation of the clause directly in question.

The will was dated the 14th of July, 1827, and by it the testator gave his freehold messuage or tenement and premises which he then occupied, his household goods and furniture, plate, linen, and china, money in the funds, and all other his estate and effects whatsoever and wheresoever, to trustees, their heirs, executors, and administrators, upon trust to permit the testator's daughter Kezia to have the use of his said household goods and furniture, plate, linen, and china, and freehold messuage, tenement, and

¹ See 1 Jarman Wills (3d Eng. ed.), 336 ; 2 *id.* 19, 20 ; *Watkins v. Williams*, 3 M.N. & G. 622, and cases in note (1) ; *Bowes v. Goslett*, 27 L. J. Ch. 249 ; *Greated v. Greated*, 26 Beav. 621.

premises for her life, for her separate use; and also upon trust to pay and apply the dividends and interest of the testator's * 54 money in the funds, and of all * other his personal estate and effects, to his said daughter Kezia during her life, also for her separate use. The will then proceeded as follows:—

“And from and after the decease of my said daughter, then I give and devise my said freehold messuage or tenement and premises unto my grandson John Yalden, the son of my said daughter Kezia, and his heirs and assigns for ever; but in case my said grandson shall die under the age of twenty-one years without lawful issue, or in case he should live to attain the age of twenty-one years, and die without lawful issue, and without having sold or conveyed the same to any person, or without devising the same by his last will and testament, then, and in either of these cases, I give and devise my said freehold messuage or tenement and premises unto the children of my late daughter Nancy Benham, the late wife of the said John Benham, who shall live to attain the age of twenty-one years, and their heirs, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants; and if but one such child should live to attain the age of twenty-one years, then I give and devise the same to such only child and his and her heirs.”

And after bequeathing various legacies payable after the decease of the testator's daughter Kezia, the will proceeded thus:—

“And from and after the decease of my said daughter Kezia Yalden, I give and devise all the rest, residue, and remainder of the trust moneys, stocks, and securities, household goods and furniture, plate, linen, and china, and personal estate whatsoever and wheresoever, unto my said grandson John Yalden, to and for his own use; but in case he shall die under the age of twenty-one years without leaving lawful issue, or if he should attain * 55 * the age of twenty-one years and die without leaving lawful issue, and without having disposed of the same by his last will and testament or otherwise, then and in either of the said cases I give and bequeath all such rest, residue, and remainder of my said trust moneys, stocks, and securities, household goods, and personal estate and effects, unto all and every, the child and children of my said late daughter Nancy Benham who shall live to attain the age of twenty-one years, to be equally divided amongst them, share and share alike, as tenants in common and

not as joint tenants; and if but one shall live to attain the age of twenty-one years, then I give the whole thereof unto such only child and his or her executors or administrators."

The Solicitor-General and *Mr. Metcalfe* in support of the petition. — The gift to the lunatic of the residue is absolute in the first instance, subject to be divested on his dying under twenty-one. But the executory limitation over on his attaining twenty-one and dying without issue, and without disposing of the residue by will or otherwise, is inconsistent with the previous gift, and is inoperative. *Ross v. Ross*, (a) *Attorney-General v. Hall*, (b) *Robinson v. Dugate*, (c) *Cuthbert v. Purrier*, (d) *Grey v. Montague*. (e)

They also referred to *Doe v. Thomas*, (g) and contended that the corresponding disposition of the realty showed that the word "otherwise" must be taken in the most extensive sense.

* *Mr. Walker* and *Mr. Baggallay*, for persons claiming. * 56 under the executory limitation, contended that the executory bequest was valid, and reduced the interest of the lunatic to an estate for life in the event of his dying after attaining twenty-one without leaving issue, and without having disposed of the residue. They referred to *Doe v. Glover*, (h) *Beachcroft v. Broome*, (i) *Borton v. Borton*, (k) *Downes v. Timperon*. (l)

[*LORD JUSTICE KNIGHT BRUCE* in the course of the argument referred to *Baggett v. Meux*, (m) *Tomlinson v. Dighton*, (n) and *Hales v. Margerum*. (o)]

Mr. Kenyon Parker appeared for the trustees.

THE LORD JUSTICE KNIGHT BRUCE. — Our present impression upon the authorities is in favour of giving the lunatic an absolute

(a) 1 J. & W. 154.

(b) *Ib.* 158 n.

(c) 2 Vern. 181; and see *Constable v. Bull*, 3 De G. & S. 411; 1 Sugd. on Powers, 125.

(d) *Jacob*, 415.

(e) 2 Eden, 205; and 6 Bro. P. C. 429.

(g) 3 A. & E. 123.

(l) 4 Russ. 334.

(h) 1 C. B. 448.

(m) 1 Coll. 138; 1 Phil. 627.

(i) 4 T. R. 441.

(n) 1 P. W. 149.

(k) 16 Sim. 552.

(o) 3 Ves. 299.

interest. Unless we shall mention the case again this term, our opinion must be taken to remain so.

THE LORD JUSTICE LORD CRANWORTH. — I am at present of the same opinion, and I do not feel any regret at it, because I think that, if the testator had been told that his grandson would become a lunatic, he would have wished that provision might be made for him out of the capital. Of course this consideration cannot influence my decision.

The case was not mentioned again.

* 57 * In the Matter of WILLIAM BODEN'S MORTGAGE TRUST, and of the TRUSTEE ACT, 1850.

Ex parte WILLIAM PEACH and JOHN BODEN.¹

1851. November 23 & 24. Before the LORDS JUSTICES.

Where a mortgagee in fee (who has never been in possession or in receipt of the rents and profits) has died intestate as to the mortgaged hereditaments, and his heir cannot be found, the Court may, under the Trustee Act, 1850, make an order vesting the legal estate in his executors.²

THIS was the petition of executors of a mortgagee in fee for a vesting order under the Trustee Act, 1850.

Mr. William Boden, the mortgagee, died in 1847 intestate as to the legal estate in the mortgaged hereditaments, but having made a will and appointed the petitioners his executors. His brother, Joseph Boden, who had left his wife and relatives in 1829, and had not been since heard of, was, if living at the mortgagee's death, his heir-at-law. The petitioners having proved the will were desirous of transferring the mortgage, and sought by the present petition an order to vest the legal estate in themselves.

¹ S. C., 9 Hare, 820.

² 1 Dan. Ch. Pr. (4th Am. ed.) 193, note (6); *Re Lea's Trust*, 6 W. R. 482, V. C. W.: *In re Quinlan's Trust*, 9 Ir. Ch. 306. But see *Re Hewitt*, 27 L. J. N. S. Ch. 302; *Meyrick's Estate*, 9 Hare, 116.

THE VICE-CHANCELLOR TURNER thought that the Act did not enable him to make the order sought; and the petition was brought before the Appellate Court at his Honor's suggestion.

Mr. E. Webster, for the petition.

The Act provides, (a) that when the mortgage-money shall have been paid to a person entitled to recover the same, or such last-mentioned person shall consent to an order for the reconveyance of the land, then in the circumstances * specified * 58 in the Act (including such circumstances as have here occurred) it shall be lawful for the Court to make an order vesting such lands in such person or persons, and in such manner, as the Court shall direct. There is nothing to oblige the Court to construe the word "reconveyance" as a conveyance to the mortgagor; and so confined a construction would very much impair the utility of the enactment. This case is distinguishable from that of *Re Meyrick* (b) by the circumstance of the petitioners being executors and not administrators merely:

THE LORD JUSTICE KNIGHT BRUCE. — The question is, whether we are so far bound by the letter of the Act as to be unable to act upon its spirit, or whether we may not hold a conveyance from the heir of the mortgagee to the executor or administrator of the mortgagee to be comprised within the term "reconveyance." Would not the former of those constructions be *hæc in literâ*? I am not disposed to think the merely literal interpretation the correct one.

THE LORD JUSTICE LORD CRANWORTH. — I think I see even upon the face of the clause that the legislature did not mean to confine its operation to a case of simple reconveyance in the literal sense of the word. It has the words "in such manner and for such estate as the said Court shall direct;" and that is not all, for it goes on to say that the order "shall have the same effect as if the heir or devisee, or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate," words which do not seem confined to a reconveyance.

(a) Sect. 19.

(b) 9 Hare, 116.

* 59 * Their Lordships made an order referring it to the Master to inquire and state whether William Boden, deceased, in the petition named, was, under any and what deed, mortgagee in fee of the hereditaments in the petition mentioned ; and whether he was ever and when in possession or in receipt of the rents and profits of the said mortgaged estate ; and whether he died seised in fee of the said estate ; and whether he died intestate as to the said estate ; and whether he left any and what person his heir-at-law ; and whether the legal estate in the mortgaged hereditaments was vested in any and what person as the heir-at-law of William Boden, or in whom such legal estate was then vested ; and whether the heir-at-law, or the person in whom such legal estate was vested, was out of the jurisdiction of the Court or not ; and whether the heir-at-law, or such person as aforesaid, was ever in possession or in the receipt of the rents and profits of the said estate ; and whether the heir-at-law or such person was living or dead, or whether it was uncertain whether he was living or dead, or whether he could be found, with liberty to state special circumstances ; and after the Master should have made his report, such further order was to be made as should be just. (a)

(a) The Master found that the mortgage-money remained due to the petitioners, that their testator was never in possession, or in receipt of the rents and profits, that he died intestate as to the legal estate in the mortgaged property, and that Joseph Boden, if living, was the testator's heir-at-law, and that he could not be found, and that it was uncertain whether he was living or dead, and that he had never entered into possession or into the receipt of the rents and profits of the mortgaged hereditaments. On the 22d of December, the Vice-Chancellor made an order confirming this report, and vesting the legal estate in the petitioners and their heirs, subject to the equity of redemption.

* In the Matter of the Trusts of the Will of THOMAS * 60
KNOWLES, deceased ;

And in the Matter of 10 & 11 Vict. c. 96.

1851. November 24. Before the LORDS JUSTICES.

Where a person had at his death, and when letters of administration were granted, *bona notabilia* in one diocese only, the subsequent payment of a portion of them into the Court of Chancery does not render a prerogative probate necessary to obtain payment out of Court.¹

Where therefore an intestate was, at his death, entitled to legacies under two wills which had been proved in the Consistory Court of Chester, in which diocese the executors and trustees of both wills were also living at the death of the intestate, and letters of administration to the intestate, who died abroad, were granted by the same Court, and afterwards the trustees of one of the wills paid the money into the Court of Chancery under the Trustees Relief Act, it was held that the diocesan letters of administration were sufficient to authorize the administrator to receive the money out of Court.

THOMAS KNOWLES, by his will, dated 16th February, 1810, after directing the payment of all his debts, funeral expenses, and charges of probate, gave, devised, and bequeathed all his real and personal estates and effects to William Harvey and James Harvey, both of Liverpool, in the county of Lancaster, their heirs, executors, administrators, and assigns, upon trust to sell the same, and out of the proceeds to pay certain legacies, and to divide and distribute the residue into four equal parts, and put and place them out at interest, and pay the dividend, interest, and annual produce of one share to his son Michael Knowles for his life ; and after his death upon trust to divide the capital among all his children who, being sons or a son, should attain the age of twenty-one years, or die under that age leaving issue at their or his decease, or born in due time afterwards, or who, being daughters or a daughter, should attain that age or marry, in equal shares ; and he appointed William Harvey and James Harvey his executors. The testator died in April, 1811, and his will was proved on the 30th of May following, in the Consistory Court of the Bishop of Chester, by the executors, who possessed themselves of the personal estate, and carried the trusts of the will into execution

¹ See *In re Spencer*, *post*, 311.

* 61 except as regarded a sum of *208*l.* 8*s.* 3*d.*, being the share of Thomas Knowles the younger, one of the children of Michael Knowles, who died in September, 1834. This sum the executors and trustees retained, Thomas Knowles, the younger, having left England, and it being uncertain whether he was living or dead. He had gone to America in 1833, at the end of which year a letter was received from him, and he was expected to be in Liverpool in May, 1834, but he had never arrived there. The last intelligence of him was, that he was discharged from an hospital at Charlestown on the 9th January, 1834. William Harvey died in 1838. James Harvey died in 1841, and letters of administration of his goods, chattels, and credits, were on the 3d of June, 1841, granted by the Consistory Court of the Bishop of Chester to Robert Ellison Harvey, Thomas Mather and Thomas Harvey, both of whom lived in that diocese.

In August, 1848, letters of administration to Thomas Knowles, the younger, were granted by the Consistory Court of the Bishop of Chester to William Knowles, his brother.

The administrators of the surviving trustee considering that there was some difficulty, under the circumstances, as to paying Thomas Knowles, the younger's, share, paid it into Court on the 10th of March, 1851, under the provisions of the Trustees Relief Act.

William Knowles, the administrator, and the other next of kin of Thomas Knowles, presented their petition under the Act, praying that the sum then standing in the bank books to the credit of the Accountant-General, in the matter of the Act and of the trusts of the will, might be paid to the petitioner William Knowles, as the administrator and sole legal personal representative of the intestate Thomas Knowles, the younger.

* 62 * On the 26th of July, 1851, the petition was heard by the Vice-Chancellor KNIGHT BRUCE, who, being satisfied with the evidence as to the death of Thomas Knowles, the younger, on the 1st of August made the order as prayed.

The registrar (*Mr. Colville, Jr.*) thought that he could not draw up the order without the production of prerogative letters of administration. The matter was thereupon again mentioned to the Vice-Chancellor, who having been informed by the registrar that the universal practice in the office was to require the production of prerogative letters of administration, said that he would not

take upon himself to alter the practice, and suggested that the matter should be mentioned to the Lord Chancellor. After the statute came into operation establishing the Court of Appeal in Chancery, the Lord Chancellor, on the matter being mentioned to his Lordship, directed the question to be brought before the Lords Justices, and it now came on to be disposed of.

Among the affidavits was one that Thomas Knowles had no other property except the sum in question, and a sum of 50*l.* to which he was entitled under another will proved in the Consistory Court of Chester, and due from executors living in that diocese, and that the letters of administration had been granted with respect to these funds and no other property.

Mr. E. F. Smith, in support of the petition. — The situation of the property at the time of the death of the person to whom administration is sought is that which alone is regarded in the determination of the proper jurisdiction to grant the administration. Any change in the situation of the property afterwards cannot affect the question. At the moment of the death the right * to administer the goods in the diocese or province * 63 accrues, and cannot be ousted by the subsequent removal of any part of the goods into a different diocese from that in which they were at the time of the death. Unless at this period there were *bona notabilia* in different dioceses the right of the ordinary attached, and not that of the metropolitan. This is clear from the form of the grant, which has these words: "having whilst living, and at the time of his death, goods in divers dioceses." 1 Williams on Executors, 370 (4th edition).

THE LORD JUSTICE KNIGHT BRUCE. — All things being as they are stated on these affidavits to be, this fund was, from first to last, merely and entirely Cestrian. If ever there was a case in which the rule requiring prerogative probates and prerogative letters of administration might be relaxed, it is the present. I think that here the rule, strict as it is, — and perhaps properly strict, — may be dispensed with, and that this fund may be paid out on these diocesan letters of administration. It must be understood that the order is made with reference to the circumstances of this case.

THE LORD JUSTICE LORD CRANWORTH. — The diocesan letters of administration were in fact taken out before the money was paid into Court; and I confess that, in agreeing with my learned brother in the order now to be made, I should have been willing to make it even if the letters of administration had been taken out after instead of before the payment of the money into Court. It is, however, unnecessary now to decide that. The order will be for the transfer of the fund to the petitioner on the diocesan letters of administration. (*a*)

* 64 * In the Matter of the IMPERIAL SALT and ALKALI COMPANY, and of the JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 (11 & 12 Vict. c. 45).

Ex parte SLATTER'S Executors.

1851. November 24. Before the LORDS JUSTICES.

A contributory to a joint-stock company had required, under the 37th section of the Joint-stock Companies Winding-up Act, 1848, to have notice of all proceedings before the Master in the matter of the company. The official manager being about to submit to the Master proposals for the sale of the works of the company, and for a reserved bidding, it was stated that the solicitor who had attended for the contributory was the solicitor of persons desiring to purchase the works, and might, if he were allowed to attend, make use of the information which he would thereby acquire to the prejudice of the estate. *Held*, that the Master was not justified in ordering that the official manager should attend him in private on the matter of the reserved bidding.¹

THIS was an appeal of the official manager of the above company from a decision of Vice-Chancellor PARKER (reported 5 De Gex & Sm. 34), discharging an order of the Master. The Master by the order directed that the official manager should attend him

(*a*) See *Druce v. Denison*, 15 Sim. 356; *Jones v. Howells*, 2 Hare, 353; *Beadler v. Birch*, 10 Sim. 340; *Scarth v. Bishop of London*, 1 Hagg. 623; *Yockney v. Foyster*, 1 Hagg. 631, 636; 1 Williams on Executors, 257 (4th ed.); *Dan. Ch. Pr.* 304 (2d ed.); see also *Re Spencer*, *post*, 311.

¹ See 2 Lindley Partn. (Eng. ed. 1860) 1062, 1144, 1145.

privately for the purpose of fixing a reserved bidding upon an intended sale of the works of the company. The reason of the Master's order, explained in a memorandum upon the proceedings, was, that the official manager considered it inexpedient that the grounds should be known on which he should propose to fix the reserved bidding.

The respondents were placed on the list of contributories as the executors of a testator named John Slatter, and had, under the 38th section of the Winding-up Act of 1848, required to have notice of all or any of the proceedings in the matter of the company. It was alleged that the solicitor by whom they appeared was also the solicitor of persons who were desirous of becoming purchasers of the plant, and might make use of the information which he might acquire by attending before the Master for the benefit of the intended purchasers, and against the general benefit of the estate.

* An affidavit to that effect, which had not been used in the Court below, was tendered in evidence on behalf of the appellant. On the counsel for the respondents objecting to its reception, and citing *Besley's Case*, (a) their Lordships said they would give leave to the appellant to use the evidence, but that the respondents might have time to answer it if they required it. The respondent's counsel did not ask for time, and the case proceeded. * 65

Mr. Malins and *Mr. C. L. Webb*, for the appellant, the official manager. The Vice-Chancellor considered that the 38th section of the Winding-up Act, providing that all contributories should be entitled to require notice at their own expense, and personally, or otherwise, to attend all proceedings in the matter of the company, was absolute, and precluded the Master from exercising any discretion on the subject. But we submit that, by this section, it was not intended to take away the power of the Master to proceed in such manner as will be most for the benefit of the general body. For instance, a contributory would not be entitled to attend if the subject of the inquiry was whether he was in a condition to pay the amount of a call. In *Barber's Case*, (b) the Court discharged a contributory from further attendance before the Master. The

(a) 3 Mac. & G. 287.

(b) 1 De G. & S. 726.

118th section of the Act provides that the general practice of the Court of Chancery, so far as it is applicable, shall apply to all proceedings under the Act. Now, by the 51st order of April 3d, 1828, the Master is empowered to regulate the manner of executing the decree, and to state what parties are entitled to attend future * 66 proceedings. (a) Many cases * may be supposed in which some of the parties to a cause may have an interest adverse to the efficient prosecution of the decree, and in which their attendance before the Master might be mischievous. And the Act provides in the 34th section, that the official manager, with or without notice to any contributory, shall, without the necessity of any proposal in writing, take the directions of the Master from time to time with reference to all proceedings necessary to be done or taken in order to the complete and effectual winding up of the affairs of the company; and that it shall be lawful for the Master to give such directions accordingly. It is clear, therefore, that the 38th section admits of some exceptions, and that there are some proceedings of which the contributories are not entitled to have notice. The practice of reserved biddings is of modern introduction, and in *Shaw v. Simpson*, (b) Lord ELDON observed that, unless guards were put upon it, it would be open to great mischief. In *Jervoise v. Clarke*, (c) the order was that the Master should use his discretion as to communicating the reserved bidding to the parties or any of them.

Mr. Roxburgh for the respondents. — The respondents have never required to know what the reserved bidding was to be. They only insisted upon their right to attend for the purpose of seeing that all the materials were before the Master to enable him to come to a correct conclusion. If the Winding-up Acts had never been passed, and the company were in the course of being wound up under the ordinary jurisdiction of the Court, all parties would be entitled to attend. The case of *Ex parte Barber*, * 67 referred to on the other side, does not * apply, having been decided on the 37th, and not the 38th section. Under the former, the Master may direct contributories to attend at the expense of the estate; and in the case referred to, the Master discharged the contributory from further attendance upon those terms.

(a) See *Davies v. Combermere*, 9 Jur. 76.

(b) 1 Jac. & W. 392 n.

(c) 1 Jac. & W. 389.

But the contributory would still be entitled to attend under the 38th section at his own expense, on requiring to be served with notices according to that provision. The 51st of the orders of 1848 was intended for the same purpose as the 37th section, that of limiting the number of persons who might attend before the Master at the expense of the estate. It only relates to costs; no case can be produced in which a party interested has been refused an opportunity of attending before the Master at his own expense.

THE LORD JUSTICE KNIGHT BRUCE. — I have little doubt of the power of the Court to exclude one of several defendants, if the reason, justice, and fairness of the case should require it.

Mr. Roxburgh. — No such case is established here. It was necessary to introduce the 34th section which has been referred to, otherwise the Master could not have proceeded in the absence of a contributory without notice to him, although the contributory might not have made the requisition contemplated by the 38th section.

Mr. Malins in reply.

THE LORD JUSTICE KNIGHT BRUCE. — It is difficult, or impossible, to say that these contributories are not to have power to attend before the Master. The case of the appellant is, that the respondents are acting by solicitors who also represent another client having an interest at variance with those * which the * 68 Master and the official manager are bound to protect. I confess that if I were at liberty to act upon the impression which the materials before the Court have made upon my mind, I should be disposed to agree with what the Master has done. I believe that he has done substantial justice between the parties. But the materials before us are not in my opinion sufficient—technically and in form sufficient—to support what he has done, and I do not, therefore, see my way to dissent from the Vice-Chancellor's decision.

THE LORD JUSTICE LORD CRANWORTH. — I am of the same opinion, except that I am not quite so confident that there is anything behind the scenes. There seems to be here under the Act a legal

right. I will not say that we have no power of controlling it, but I do not think that the circumstances appearing on the materials before us require us to exercise such a power.

Appeal dismissed with costs out of the estate.

1851. November 22, 25. Before the Lord Chancellor Lord TRURO.

On a sale of real estate by a trustee under a will open to suspicion as having been obtained by undue influence, the title was approved, but before the actual completion of the contract the heir-at-law gave notice that he intended to dispute the will and brought an action against the tenant for rent: the purchaser thereupon refused to complete, and a bill for specific performance was filed, but before it came to a hearing the action brought by the heir was tried and a verdict given against the heir: a reference as to title was then directed, and the Master having reported in favour of the title, a decree was made for specific performance. On appeal, however, by the purchaser, the Lord Chancellor (Lord COTTENHAM) ordered the case to stand over generally, with liberty for the vendor to take such proceedings for establishing the will as he should be advised. The vendor then instituted a suit against the heir, which resulted in the will being established. The Lord Chancellor (Lord TRURO) thereupon confirmed the decree for specific performance, and directed the purchaser to pay interest from the time when under the contract the sale ought to have been completed,¹ and also to pay the costs of the suit subsequently to the hearing when the reference as to title was directed;² his Lordship held that at that time there had been such reasonable inquiry into the title as ought to have satisfied the purchaser, and that therefore the consequences of the further proceedings by which the will was established, both in reference to the costs of the suit for specific performance and the payment of interest, must fall on the purchaser.

The judgment of Lord COTTENHAM, in this case, 2 Phil. 619, observed upon.

THE general facts of this case will be found reported in the 2d volume of Mr. Phillips's Reports, page 619: it will, therefore, be sufficient here merely briefly to recapitulate the principal of them.

¹ See Sugden V. & P. (14th Eng. ed.) 627; (7th Am. ed.) 254 [793], and cases in note (2); *Monro v. Taylor*, 3 M'N. & G. 713; *De Visme v. De Visme*, 1 M'N. & G. 336 and note (2); 346 and cases cited in note (1).

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1407, 1408, and cases in notes.

The suit of *Grove v. Bastard* was instituted by a vendor for the specific performance of a contract of sale entered into in July, 1845, the title of the plaintiff, who was a trustee for sale, being derived under a will open to the suspicion of having been made under undue influence. The testator died in 1844; and in January, 1846, the heir brought an action for money had and received against certain tenants of the property sold to recover rent (not an action of ejectment as stated in the report above referred to). In consequence of these proceedings on the part of the heir, the purchaser declined to complete, and the vendor thereupon filed his bill for specific performance. The cause was in the paper for hearing before the Vice-Chancellor KNIGHT BRUCE, in May, 1846, but was ordered to stand over in order to see the result of the * action at law. In July, 1846, the action was tried, and * 70 the heir failed in establishing his claim. On the 3d August, 1846, the suit was brought on before the Vice-Chancellor, when the usual order of reference as to title was made: the Master reported in favour of the title. In the mean time a motion for a new trial of the action had been made by the heir, and refused by the Court of Common Pleas. On the suit coming on for further directions, the Vice-Chancellor confirmed the Master's report, and made a decree for specific performance, without requiring the plaintiff to establish the will. By this decree the purchaser was ordered to pay interest at four per cent, from the 25th December, 1845, the day fixed by the contract of sale for the completion of the purchase; and was also ordered to pay the costs of the suit, from the 3d August, 1846, the date of the order of reference.

The defendant appealed from this decision, and on the 6th May, 1848, the Lord Chancellor, Lord COTTENHAM, holding that it was more consonant to the principles of the Court that the validity of the will in such a case should be conclusively determined if possible between the vendor and the heir, than that it should be left to be litigated between the heir and the purchaser after the purchase-money should have been paid, made an order that the plaintiff should be at liberty to take such proceeding as he might be advised for the purpose of establishing the will, and that the appeal of the defendant should stand over generally.

In pursuance of this order, the plaintiff, on the 16th June, 1848, commenced a suit of *Grove v. Young*, against the heir-at-law; the bill prayed that the will of the testator might be established,

and that if the defendant should not admit the will to be a valid will, then an issue might if necessary be directed, or an
 * 71 action or * such other proceeding as the Court might think fit might be ordered to be brought or taken, for the purpose of trying the validity of the will. On the 7th December, 1848, the heir put in his answer, setting up insanity of the testator and undue influence exercised over him by his solicitor in the preparation of the will. Both parties having gone into evidence, the cause came on to be heard on the 2d June, 1851, and, at the request of the defendant the heir-at-law, the Court then directed four issues raising the question of the validity of the will, to be tried at the next assizes for the county of Devon. The effect of the first of these issues was, whether the testator did, by the document purporting to be his will, devise his lands and hereditaments or any of them; and the effect of the other three issues was, whether the testator did, by his said will, direct that his trustees should make such payments as the plaintiff stated they were directed by the said will to make.

These issues came on to be tried on the 30th and 31st July, 1851, at Exeter, before Lord CAMPBELL and a special jury; when, after examination and cross-examination of the plaintiff's witnesses (the defendant, the heir, not calling a single witness in support of the case which he had set up in equity), the jury gave a verdict for the plaintiff on all the issues, thereby establishing the validity of the will.

The cause of *Grove v. Young* afterwards came on to be heard, before the Vice-Chancellor Sir JAMES PARKER, on the 11th November, 1851, upon the finding of the jury, when his Honor made a decree establishing the will; and, as to costs, giving no costs as regarded the general result of the suit and of the issues, but making the heir pay the costs of so much of the suit as had
 * 72 been occasioned * by the allegations of improper conduct in the solicitor raised by the answer and by the evidence gone into in support of them.

In consequence of this decision (a report of which will be found in the 5th volume of Messrs. De Gex & Smale's Reports, page 38), the appeal of *Grove v. Bastard* now came on to be finally disposed of.

Mr. Willcock, for the defendant the purchaser, submitted, first,

that he ought to be treated as in possession only from the time when a good title was first shown, and that that was not done until the decree of the Vice-Chancellor establishing the will; that the purchaser, in entering into the contract, did so on the faith of the trustee having a good marketable title, and not one which he was to contest with the heir; and that the plaintiff, under the circumstances, ought to bear the costs of the suit. He submitted further, that the view taken of the case by Lord COTTENHAM clearly was, that the purchaser could not be compelled to complete until the will had been established, and that, therefore, the Master was wrong in finding a good title, there not being a good title when the bill was filed; that the purchaser had done nothing to occasion litigation, having only required that the title offered him might be cleared of doubt; that he was therefore entitled to ask that the decree for specific performance might be as from the time when the will was established, on the usual terms of his paying interest and taking the rents; and that the costs of the suit, which was evidently premature, should be borne by the plaintiff.

Mr. Malins and *Mr. Rasch*, for the plaintiff. — The decision of Lord COTTENHAM in this case, as represented on the other side, would go to the extent that devisees in trust to sell under a will cannot carry out the * trust, if the heir ques- * 78 tions the will, until the will has been established by a decree of the Court, a proposition which cannot be right. On the question of costs, the general principle applies that the unsuccessful party must pay them. The purchaser here raised an objection which has turned out without foundation, and this too when he had notice of the failure of the heir in the action brought by him. *Biscoe v. Wilks.* (a) The real effect of Lord COTTENHAM's decision, as we submit, was only to give the purchaser the opportunity of trying the question he had himself raised; but it did not alter the principle which would regulate the matter of costs, if the purchaser failed, as he has done: he ought therefore to bear all the costs, or, if not all, at least those subsequent to the order of reference. The same principle that applies to costs will apply to the payment of interest by the purchaser: he must pay interest from

the time when he was bound to complete, irrespective of the litigation which he has raised. (They also cited *Vancouver v. Bliss*, (a) *Wyvill v. The Bishop of Exeter*, (b) *Thorpe v. Freer*, (c) *Croome v. Lediard*, (d) *Osbaldeston v. Askew*, (e) *Scoones v. Morrell*, (g) *Green v. Pulsford*, (h) Sugd. Vend. & Purch. p. 284, ed. 1851.)

Mr. Willcock, in reply.

THE LORD CHANCELLOR commenced his judgment by giving a history of the facts of the case, which it is not necessary here to repeat. His Lordship then, after stating the questions which had been raised before him in argument, proceeded to the following effect:—

* 74 * It appears that the abstract delivered by the vendor set out the will of the testator and other circumstances connected with the title, all of which, with the exception of the will, have been unimpeached; in fact, the title was approved at the time when the heir-at-law gave notice of his intention to dispute the will. The question then is, whether, at that time, a good title had or had not been shown, the title being now the same as it was then, and the objection of the heir being one not apparent upon the face of the abstract, but founded upon circumstances quite *dehors* the will. The abstract, indeed, showed a perfectly good title, and one to which no objection is now made. The heir having given notice of his intention to dispute the will and brought an action, and the purchaser thereupon refusing to complete his contract, the bill in the present suit was filed. The Vice-Chancellor seems, in the first instance, to have thought that it was reasonable to give the purchaser the benefit of the inquiry into the validity of the objection which the trial of the action would afford, and the cause stood over accordingly: but the action having been tried, and the heir having failed, his Honor, considering that sufficient inquiry had taken place to satisfy the purchaser, made the decree, which was afterwards brought by appeal before Lord COTTENHAM.

It is what took place on the hearing of that appeal that has

(a) 11 Ves. 458.

(b) 1 Price, 292.

(c) 4 Madd. 466.

(d) 2 M. & K. 293.

(e) 1 Russ. 160.

(g) 1 Beav. 251.

(h) 2 Beav. 70.

formed the great subject-matter of the discussion before me. It appears that Lord COTTENHAM was of opinion that, if the purchaser required it, he was entitled to have the will established; and he therefore directed the cause to stand over, to give the opportunity of filing a bill for the purpose of establishing the will. Lord COTTENHAM seems to have mainly proceeded upon the authority of the case of *Green v. Pulsford*, (a) but I own * I have some * 75 difficulty in applying that case as an authority for the course he adopted. His Lordship here read the judgment of Lord COTTENHAM, (b) and then proceeded:—

In *Green v. Pulsford* there was a power of appointment to a husband and wife amongst the children, or to any one child; then, there being sons, an appointment was made to one of the daughters, and the father and mother and the daughter soon afterwards joined in raising a sum of money on mortgage, which money was paid to the father, mother, and daughter: there was a sale under that mortgage, and after the title had been generally approved, notice was given by another of the children that it was insisted that the appointment to the daughter was evasive and fraudulent; but the Master of the Rolls held that that notice was no reason to excuse the non-performance of the contract, saying that it was a bare allegation only, and raised no objection to the title: it appears also, that, on the purchaser objecting to complete, the vendor brought an action at law for the purchase-money, and recovered, thus showing that he had a good title: and I see no reason why the same course might not have been taken in the case now before me.

It is true that that may be a good title at law which, in one sense, is not a good title in equity; that is, there may be circumstances connected with the title which a Court of Equity will deal with by saying that if the party has a remedy at law he may pursue that remedy; but if he wants the assistance of a Court of Equity to get something beyond his strict legal right, the Court will then exercise its discretion on all the circumstances of the case, and do what it thinks equitable between the vendor and the vendee, independently of the strict legal obligation. The objection made to * the appointment in *Green v. Pulsford*, * 76 would seem quite as strong as that to the will in the present case; but no inquiry was there directed, it being held that the

(a) 2 Beav. 70.

(b) 2 Phil. p. 621.

notice of an objection, being a mere allegation, was not deserving of being treated so seriously as to be received as an excuse for the non-performance of a contract. One cannot help contrasting this with what has occurred in the present case, not only in reference to the fact of the inquiry by means of the action, but attending to the circumstances under which that inquiry took place, the heir-at-law not being taken by surprise, but knowing precisely from the attorney's declaration (and as giving him this advantage the declaration was no doubt important) what was to be the evidence against him. Had there not then been, when the case was heard before the Vice-Chancellor, such a reasonable course of inquiry as to satisfy the claim of a purchaser upon a mere notice; the trial had taken place, and a verdict had been obtained; and, before the cause came on before Lord COTTENHAM, there had been a solemn confirmation of that verdict by the judgment of the Court of Common Pleas.

Now, the judgment of Lord COTTENHAM is undoubtedly very important, because if in every sale under powers contained in a will the heir-at-law may impede all disposition of the property by giving notice that he disputes the will, and thereby compelling those who claim under the will to file a bill in chancery to establish the will, it appears to me that a wide door will be opened to extortion and litigation, and many more wills will be disputed than would be if no such proceeding was necessary. In this case the heir had contested the will, and had had the costs to pay of a suit at law for his pains; and it seems to me very doubtful whether he ever would

have carried the matter further but for the bill filed to establish the will, which in fact dragged him before the Court, * and * 77 this at the request of the purchaser. If then there had been reasonable inquiry, and if the trial of the action ought to be considered as a reasonable inquiry, and the verdict a reasonable result to satisfy the purchaser, I see nothing in Lord COTTENHAM's judgment which at all indicates what he would do with the costs when it came back again. It was quite competent for the purchaser to rest satisfied with the first inquiry, and also to ascertain whether or not the heir-at-law was in possession of any further information for the trial of the second cause. If it was thought reasonable, at his request, that the will should be established, the question would remain whether he should pay the expense, or whether it should be at the expense of the vendor. Now the

decree casts the expense on the purchaser, not from the time when the purchase ought to have been completed or when the bill was filed, but from the time when the cause had been tried and a verdict found in maintenance of the will. I own it strikes me that this was as liberal a view to take of the matter in disposing of the costs as the purchaser had any right to expect; and I think that if he thought fit to attain that absolute certainty of his title which the decree in the suit to establish the will would give him, that that must be at his own cost and expense so far as concerns the costs in this suit, and not at the expense of the estate to which the property, the subject of contest, belongs.

There are several cases which appear to me to go a very long way in proving that this view of the case is correct. In *Vancouver v. Bliss*, (a) Lord ELDON lays down the rule that the unsuccessful party must show some reason why he should not pay the costs. In *Osbaldeston v. Askew*, (b) it was held that the dependence of a suit * formed no objection to a title, although that * 78 suit was depending previous to the bill being filed to enforce the specific performance: and although there are no means of ascertaining how the costs would have been ultimately dealt with, it is quite plain that there it was considered not enough to show that somebody had raised objections, but that those objections must be brought before the Court, so that the Court might see whether there was a reasonable foundation for them. Nothing of that kind has been done in the case before me: there was nothing more than a notice that the heir meant to dispute the will, and that he meant to dispute it on grounds as to which it was impossible from an inspection of the will for the Court to come to any judgment impeaching its validity. Without then referring to all the cases which were mentioned at the bar, I cannot see any case which at all would warrant my varying the decree in the respect which is asked. The case of *Scoones v. Morrell* (c) was also that of a sale under a will, the purchaser had approved of the title, but afterwards the heir-at-law gave notice of an objection to the will; his objection apparently was, as it is here, that the will was obtained by undue influence: a bill was filed, pending the suit, to establish the will, and the will was ultimately established notwithstanding the notice of the objection. The facts of that case

(a) 11 Ves. 458.

(b) 1 Russ. 160.

(c) 1 Beav. 251.

are very parallel to those of the present; and a decree was made for specific performance, with costs against the defendants. I can see very little distinction between that case and this before me, except that in this there had actually been a verdict, which there had not been in that case, prior to the date at which the defendant is fixed with the costs.

It seems to me, therefore, that there is no reason why
 * 79 * that which is admitted to be the general rule as to costs should not be followed. Having looked into the circumstances which are offered in order to bring the present case within the exception, I think that they have not that effect; on the contrary, they rather show that this is a stronger case to entitle the plaintiff to his costs, on the ground that the defendant, after having had every reasonable inquiry made into the subject of the objections which had been raised to the title, still thought fit to decline to complete the purchase, and to require further inquiry. He has had that further inquiry, and I think that must be at his own expense.

The next point is as regards the interest. The contract was to be completed on the 25th December, and the result of the judgment is that it ought to have been so completed. The purchaser having retained his money, must pay interest after the rate usually allowed by the Court, from the time at which the money ought to have been handed over to the vendor. I do not learn that there was ever any proposition for investment, nor have I judicial means of knowing in what way the money was disposed of. It might have been invested, and it ought to have been employed so as to protect the purchaser, if he thought it was his interest to protect it from the loss by the payment of interest; that was his business with which the vendor had nothing to do.¹ I think, therefore, that there is no objection to the decree as it was pronounced by the Vice-Chancellor KNIGHT BRUCE, and that the appeal must be dismissed with costs.

¹ See *Burroughes v. Browne*, 9 Hare, 609, 613.

* PRICE v. GRIFFITH.

* 80

1851. November 25. Before the LORDS JUSTICES.

One of two tenants in common in fee of lands containing mines of coal and iron entered into a negotiation for a lease of minerals, and wrote a letter stating his willingness to grant a lease on the terms of a paper referred to in the letter. There were two papers, each of which in some respects answered the description in the letter. One of these purported to be terms for letting and taking coals, "&c.," under the lands in question, but contained no more definite description of the minerals which were the subject of it. In a suit by the proposed lessee for specific performance as to the moiety belonging to the tenant in common who had written the letter, *held*, —

1. That the paper to which the letter referred was not sufficiently identified.
2. That even if, as the plaintiff contended, it was shown to be the above paper, its terms were too indefinite to be capable of being enforced specifically.¹
3. That the contract being for a lease of the entirety, and the defendant not having been shown to have made any misrepresentation as to his title or otherwise, it could not be enforced against him as to one moiety only.

THIS was a specific performance suit instituted by the assignee of the benefit of an agreement entered into between two of the defendants.

The defendant Thomas Digby Aubrey Griffith and his Aunt Mary Jenkins were seised in fee as tenants in common of lands at Llettai-brongie and Gelli Eblig in Glamorganshire, containing seams of coal and iron-stone. In 1843, David Rees, another of the defendants, entered into a negotiation with the defendant Griffith for a lease the terms of which were in question. In the course of this negotiation the defendant Griffith wrote to the defendant Rees a letter as follows : —

"As to the coal at Llettai-brongie, I beg to say that I am still of the same mind as to the letting, and to you as the lessee on the terms we advanced, and which we both coincided in, which terms are stated on the agreement in Mr. Cuthbertson's hands; and the term to commence from May next."

The plaintiff alleged that the agreement referred to in this letter was a document in the following terms : —

¹ See *Casey v. Holmes*, 10 Ala. 776; *Miller v. Cotten*, 5 Geo. 341; *Tatham v. Platt*, 9 Hare, 660; *Cooper v. Hood*, 26 Beav. 293; *Ridgway v. Wharton*, 3 De G., M. & G. 677, 697 note (1), and cases cited: *Swainsland v. Dearsley*, 29 Beav. 490.

“Terms proposed by Mr. David Rees for letting and taking
 * 81 of coals, &c., at Llettai-brongie and Gelli Eblig. * Lessors
 to grant term of ninety-nine years. Term to commence
 from 1st May, 1843. If worked as a country colliery, without a
 road, rent to be 20*l.* per annum. If used for exportation or man-
 ufactories, or, if sold to manufactories, rent to be 100*l.* per annum,
 with stated royalty. Royalty to be 6*d.* per ton on all minerals.
 If minerals from other lands than the said farms be carried over
 the said farms, rent to be 100*l.* per annum, whether the minerals
 on the said farms be worked or not.

“Lessors to grant all right of waters appurtenant to the said
 farms, and not being to the detriment of the said farms, to the
 lessees as far as lessors’ right extend.

“Lessors to have the power of discontinuing said lease by
 twelve months’ notice, such notice to commence and be given on
 the 1st day of some May, ensuing. Rents to be paid every three
 months, by even and equal quarterly payments.

“The road for the working and conveyance of the said minerals,
 or minerals on other lands as before mentioned, to be completed
 within the period of three years commencing from the date of
 these presents; and if the said road be not completed within that
 space of time that nevertheless the said rent of 100*l.* be paid.

“That lessees shall supply lessors and all tenants of lessors on
 the site of working with coal for their purposes, and the purposes
 of the land they shall hold of the said lessors, free of all expense,
 save and except the expense of working the said coal.

“That lessees shall pay lessors after the rate of ten years’ rent,
 valued upon the clear land of the said farms, for all land they
 * 82 shall use in making the said road from * and at the time of
 the commencing of the said road; and that the lessors shall
 for the purpose of making such estimate produce a plan, pointing
 out the line of road they, the said lessees, intend making over the
 said land, previous to the commencement thereof.

“That lessees shall pay lessors for all timber and bark on such
 timber they shall cut, fell, or destroy, in laying down any roads,
 &c., at market price.

“Lessees to erect weighing machine, and lessors to be at liberty
 to examine books to ascertain quantity worked.”

The plaintiff, Sir Robert Price, insisted that these documents
 constituted an agreement, to the benefit of which he claimed to be

entitled under the defendant David Rees, and he instituted the present suit to enforce a specific performance against Miss Jenkins as well as against Mr. Griffith, or, in the alternative, against the latter as to his moiety. The bill had been dismissed by consent as against Miss Jenkins, the plaintiff being unable to prove her concurrence in the proposal.

The defendant Griffith, by his answer, stated in effect (among other things) that the document referred to was not that above set out, but another; and that the negotiation never arrived at the point of becoming a definite agreement.

The case was heard before Vice-Chancellor WIGRAM, who dismissed the bill with costs; and it now came on to be heard upon an appeal from this decision.

Mr. Rolt and *Mr. Hislop Clarke*, for the appellant. — The whole of the evidence shows that the document to * which * 83 the letter marked C alludes must be one of two, either that marked A or another exhibit marked Z. Now the contents of the latter show upon the face of them that it is not the one referred to. The terms of the agreement are sufficiently definite and precise when explained by the evidence of skilled persons.

If the defendant Griffith was right in his contention that there was no agreement, he ought not to have raised so many other points, and should not have been allowed all his costs.

They cited *Nelthorpe v. Holgate*, (a) and *Mortlock v. Buller*. (b)

Mr. Malins and *Mr. J. H. Palmer*, for the respondent, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — The first question is whether the documents A and C, taken together, constitute a perfect agreement capable of being enforced by a decree for specific performance. To the affirmative of that proposition there are several objections. In the first place, I am not satisfied, speaking for myself alone, that the subject-matter of the contract is sufficiently stated. I am not satisfied what was intended by the term "coals, &c." What did this "&c." include? In the next place, I am not satisfied

(a) 1 Coll. 203.

(b) 10 Ves. 292.

that the other terms of the alleged agreement are completely intelligible, or such as can be carried into execution.

But, assuming that the papers A and C comprise all necessary for constituting a binding contract, the question remains * 84 whether they have been shown to * have been acceded to, inasmuch as the paper A was not signed, but only proposed to David Rees as the conditions upon which the coal mines were to be let. The plaintiff has endeavoured to overcome the difficulty arising from the absence of a signed agreement by producing the letter marked C, and he alleges that the agreement referred to in the letter was the document marked A. There were, however, two papers (A and Z) in Mr. Cuthbertson's office, each of which may, with equal propriety, if with propriety at all, answer the description in that letter. It is, therefore, unnecessary further to investigate the meaning of the paper marked A, since it is not shown to be the document referred to as "the agreement in Mr. Cuthbertson's hands."

It is also unnecessary to consider the question arising under the Statute of Frauds.

But this is not the whole case against the plaintiff. The colliery belonged to two persons in undivided moieties. The plaintiff filed his bill against them both, alleging that the contract was binding upon both; but by an alternative prayer, he prayed relief against one, if he should fail to establish his claim against the two. The bill was afterwards dismissed against Mary Jenkins, leaving only the owner of the other share. But the owner of the other share never meant to contract for one share alone. If he intended to contract at all, he intended to contract for a lease of the whole colliery. Cases may be conceived where a person, who has contracted to convey more than it is in his power to convey, ought to be decreed to convey what he can, either with or without compensation to the vendee for such part of the subject-matter of the contract as the vendor is unable to convey. But a lease of * 85 an undivided moiety of a colliery is a very * different thing from a lease of a whole colliery; and in this case there is no evidence of improper conduct, or misrepresentation, or of the defendant Griffith having held himself out as capable of contracting for the whole, or in fact, any other circumstance constituting a ground for a decree as to one undivided share alone.

With regard to costs, the plaintiff complains that a defendant,

who ought never to have been brought before the Court at all, has set up more than one defence. But there is no reason here for dividing or giving less than the whole costs.

THE LORD JUSTICE LORD CREANWORTH. — I am of the same opinion. The Vice-Chancellor seems to have gone on the ground that there was no agreement capable of being enforced. The agreement relied on is, in two respects, deficient. I am not satisfied what that paper was which was referred to in the letter of the 15th April, 1843, as "the agreement in Mr. Cuthbertson's hands;" and if the document A be that paper, I am of opinion that the terms of it are too ambiguous for the Court to carry into effect.

The appeal must be dismissed with costs.

* ATTORNEY-GENERAL v. MURDOCH.¹

* 86

1851. November 11, 12, 14, 16, and 17. 1852. January 23. Before the LORDS JUSTICES.

A chapel in England was founded between the Restoration and the Revolution, without any deed or document declaring the purposes for which it was to be used, but it appeared that from the foundation the services had always been conducted in conformity with "the Directory," by which the mode of worship in the Church of Scotland is regulated.

Held, that the chapel must be treated as appropriated to the purposes of religious worship according to that directory, and, therefore, according to the Presbyterian form.²

A minister of such a chapel had been ordained by a Scotch presbytery. He afterwards became a member of a synod assembled in England, which adhered to certain resolutions respecting church patronage in Scotland. Subsequently a General Assembly of the Church of Scotland enacted, that all members of that synod who so adhered were no longer members of, or in communion with, the Church of Scotland. *Held*, that the minister was thereby deprived of his *status* of an ordained minister of the Scotch, or of any Presbyterian Church, and became disqualified from acting as the minister of the chapel (independently of any question, whether it was necessary for him to be a Scotch minister or licentiate), it being an essential part of the Presbyterian

¹ S. C., 7 Hare, 445.

² See *Attorney-General v. Clapham*, 10 Hare, 540; 4 De G., M. & G. 591; *Attorney-General v. St. Cross Hospital*, 17 Beav. 454.

system that none but ordained ministers or licentiates should perform divine service.¹

Semble, per Lord Justice KNIGHT BRUCE, that with respect to a question of property it is competent for a congregation of dissenters, acting unanimously and with the concurrence (where they have trustees) of their trustees, to introduce effectually into their system and constitute new regulations, not in contravention of any deed of trust, and not opposed in principle to the original constitution; and that it is competent for such a congregation in England to resolve effectually, though not irrevocably, that every future minister shall be a person in communion with the Established Church of Scotland.²

The effect of usage as evidence of the trusts,³ on which a dissenters' place of worship is held, varies greatly in different circumstances, and, the Court differing in opinion upon the evidence whether it was a necessary qualification for a minister of a particular chapel to be a minister or licentiate of the Church of Scotland, the decree of the Court below, declaring that qualification to be necessary, was affirmed, as well as other portions of the decree with which both members of the Court agreed.

THIS was an appeal from the decision of Vice-Chancellor WIGRAM, reported in the 7th volume of Mr. Hare's Reports, p. 445.

The facts of the case, and the arguments relied upon, sufficiently appear from that report and the judgments.

The Solicitor-General, Mr. Little, and Mr. T. Deere Salmon supported the information.

Mr. Rolt, Mr. Malins, and Mr. Selwyn, were for the defendant Mr. Murdoch and some other defendants.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1653; *Lewin Trusts* (5th Eng. ed.), 401, 402; *Attorney-General v. Munro*, 2 De G. & Sm. 122; *Daugars v. Rivaz*, 28 Beav. 233; *Attorney-General v. Gould*, 28 Beav. 485. As to the rights of a parish consequent upon a change in religious views and sentiments, or the adoption of a new system of divinity by their minister, and the mode of trying the question of such change, see *Burr v. Sandwich*, 9 Mass. 289; *Avery v. Tyringham*, 3 Mass. 182; *Sheldon v. Easton*, 24 Pick. 287; *Hollis Street Meeting-house v. Pierpont*, 7 Met. 499; *Attorney-General v. Meeting-house in Federal Street*, 3 Gray, 1; *Attorney-General v. Dublin*, 38 N. H. 459; *Earle v. Wood*, 8 Cush. 430.

² See *The Attorney-General v. The Meeting-house in Federal Street*, 3 Gray, 1.

³ See *Attorney-General v. Dublin*, 38 N. H. 459; *Attorney-General v. Meeting-house in Federal Street*, 3 Gray, 1; *Attorney-General v. Rochester*, 5 De G. & M. 797; *Attorney-General v. Clapham*, 4 De G., M. & G. 591; *Drummond v. Attorney-General*, 2 H. L. Cas. 837.

* *Mr. Lewin* for other defendants.

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THE LORD JUSTICE KNIGHT BRUCE. — The controversy in this suit (a cause by information and bill) concerns the trusts upon which a small landed property at Berwick-upon-Tweed, on part of which stands a building called the Low meeting-house, or now (as it seems) more generally, Hyde Hill chapel, is held. It is and has for many years been a place of worship for Protestant dissenters: that is, as the relators and plaintiffs say, for Protestant dissenters of a particular class and description, not Protestant dissenters generally, — a limitation of the term which (as I understand) the counsel for the appellants, who are three of the defendants in the cause, do not concede or admit. But that it has always been, and ought to continue to be, used as a place of worship for Protestant dissenters in some sense, and that, of this place of worship and its congregation, there ought to be a settled minister, having the right, while duly retaining that office, and willing and able for the purpose, to perform its functions, are propositions common to the disputants, and to be taken for granted; as likewise is the proposition that the term “Protestant dissenters” must in the cause be understood as a term used in England concerning the congregation of a place of worship situate in England.

The main or perhaps substantially the sole question is, as to the fitness and qualification for the particular ministerial office that has been mentioned of the gentleman who at the time of the commencement of this suit filled it, namely, the appellant Mr. Murdoch, and as to the fitness of the two other appellants, who are two of the trustees of the property for the purposes to which it is applicable, to continue in the trusteeship. But there is substantially, I think, no difference between the cases of the appellants.

* For if Mr. Murdoch ought not to continue to be the minister, it seems to me plain enough that, entertaining the same views and associated and acting together as to every thing material in this litigation, the three ought alike to be removed or retire. And if Mr. Murdoch ought to be allowed to continue as the minister, there is no case against either of the other appellants. The chief or sole contention of the relators and plaintiffs (the principal respondents in this appeal) may, with sufficient accuracy for every present purpose, be stated thus: They may be considered as insisting, first, that it is absolutely necessary to a due administration of

the trusts by which the property is bound, that the minister on the foundation should be, when appointed, and should, while its minister, continue to be, in communion with the Established Church of Scotland,—should, when appointed, be or have been a licentiate of the Established Church of Scotland, and should, while the minister on the foundation, be and continue a minister of the Established Church of Scotland.

They insist, in the second place, that Mr. Murdoch (with whom the other appellants make common cause), though when he became the minister on the foundation, and for some years afterwards, he had those qualifications, did subsequently and before the institution of this suit, avow and pursue opinions and a line of conduct disqualifying him as a minister of the Established Church of Scotland, and cease not alone to be a minister of that church, but also to be in communion with her.

Each of these propositions is combated by the appellants, who insist that Mr. Murdoch is a proper and fit person to be and continue the minister upon this foundation, that he was so when first elected and placed upon it, and that he has ever since continued to be so. Such is * the main or sole issue, or such the main, or sole issues, before us for determination, and that determination must depend (for the controversy, if not merely of fact, is more of fact than of law) on the evidence, the admissible evidence, before the Court; especially as it has been stated by the counsel on each side, that they believe the case as it stands to contain all the evidence capable of being usefully brought forward.

Now, though it will, I think, be convenient to deal with the second proposition of the relators and plaintiffs first, it may be as well previously to notice the earliest entry in one of the two only books belonging or relating to this meeting-house, which have, so far as I am aware, been produced; a book, namely, in the nature of a kirk-session record, or kirk-session book. That entry shows the manner in which Mr. Murdoch's election and appointment took place, and is thus:—

“ Session Record of Hyde Hill Chapel, Berwick-upon-Tweed, in connection with the Church of Scotland.

“ 1836. — At a meeting of the congregation of Hyde Hill chapel, formerly known by the name of the Low meeting, the congregation proceeded to elect a pastor from among four candidates who had

preached on trial, viz., the Rev. Alexander Murdoch, Rev. Robert Broomfield, Rev. Alexander Rennison, and the Rev. William M. Thompson, when the Rev. Alexander Murdoch, assistant to the Rev. James Melville Macculloch, of Kelso, was chosen by a majority of eighty-seven votes."

"1836. — A call signed by the elders and trustees and seat-holders was given to the Rev. Alexander Murdoch, and an application made to the presbytery of Kelso praying that reverend body to take him on trial for ordination, to which they readily acceded."

* "At a meeting of trustees on the 12th day of June, 1836, * 90 a deputation from the congregation, consisting of Messrs. William Wilson, William Smith, and William Rutherford, elders and trustees, and Mr. Robert Marshall, trustee, was appointed, who attended the meeting of the presbytery upon Tuesday, the 14th day of June, which day the Rev. Alexander Murdoch was ordained to the pastoral office on that occasion, as also on Thursday, the 16th day of June, when the Rev. Alexander Murdoch was inducted; the Rev. James Thompson, of Ednam, moderator of the presbytery of Kelso, presided." — "On sabbath, the 19th day of June, the Rev. James Melville Macculloch preached on the forenoon, and introduced their pastor to his flock."

I may also at the same time observe, that, with respect to the same transaction, the other of the two books has these entries: —

"Low Meeting, 5th. May, 1836.

"The committee having met agreeable to the resolutions of the 2d inst. proceeded with the election, when the numbers were as follows; viz., —

| | |
|--------------------------|-----|
| Mr. Murdoch | 145 |
| Mr. Rennison | 86 |
| Mr. Thompson | 54 |
| Mr. Broomfield | 25 |

310

"The chairman having announced the above to the meeting, informed them that the election lay between Mr. Murdoch and Mr. Rennison, and would take place on Monday 1st at four o'clock, and close at eight o'clock."

* 91 * "Low Meeting, 9th May, 1836.

"Agreeable to the above, the election was proceeded with this evening, when the numbers were, for

| | |
|------------------------|-----|
| Mr. Murdoch | 201 |
| Mr. Rennison | 114 |

87 majority

for Mr. Murdoch, who was declared pastor of this congregation."

" May, 1836.

"The call to the Rev. A. Murdoch, with a letter to the presbytery of Kelso, praying them to sustain the same, and requesting ordination, was transmitted to the moderator (Rev. Mr. Thompson, Ednam)."

" June 5th, 1836.

"At a meeting of trustees and elders, it was resolved that the members of Chirnside presbytery, with the clergymen of Berwick and Tweedmouth, be invited to dine at the Hen and Chickens Inn on Thursday the 16th, the day of Mr. Murdoch's induction."

" June 12th, 1836.

"At a meeting of trustees and elders. It was stated that a deputation ought to be sent to Kelso, to attend the ordination of Mr. Murdoch. — (Copy.)"

"Resolved unanimously that a deputation be appointed to attend the meeting of presbytery to be held at Kelso on Tuesday next, 14th June, for the purpose of ordaining the Rev. Alexander Murdoch, preparatory to his being inducted their minister. That the deputation consist of Messrs. Robert Marshall, William Wilson,

William Smith, and William Rutherford, and that they be required to present the grateful thanks of this meeting * to the reverend the moderator and other members of the Presbytery for their kind attention in holding their meeting the earliest possible for the occasion.

" (Signed) J. M. DICKSON, Chairman."

And the books of proceedings of the presbytery of Kelso in Scotland, under the date of the 1st June, 1836, contain the following memorandums : —

"Kelso, June 1st, 1836.

"The presbytery convened *pro-re nata*, and was constituted, &c. The moderator stated that he had called this meeting for the purpose of taking steps towards the ordination of Mr. Alexander Murdoch, preacher of the gospel, in the view of his entering on the pastoral charge of the Low meeting at Berwick-upon-Tweed, in consequence of an application transmitted to him in the name of the congregation and elders of the said meeting, together with a call from the same, numerous signed, which documents the moderator produced and read.

"The moderator's conduct in calling the meeting was unanimously approved of by the presbytery.

"There was produced and read a letter of acceptance from Mr. Murdoch, and a certificate from Baillie Main, bearing that he had qualified to government in terms of law. The presbytery ordered said papers to be kept *in retentis*.

"Thereupon, the presbytery, being satisfied with the documents laid on the table, resolved to take steps towards the ordination of Mr. Murdoch to the aforesaid charge, and prescribed to him the following homily: Matt. v. 8; Lect. Matt. xvii. 1, 9; Exegesis,

"Num * Deus ex purâ misericordiâ absque satisfactione nos * 93 justificat;" Exercise and addition, 1 Peter, ch. i. 19, 20, 21;

Sermon, Hebrew xii. 3. Mr. Murdoch was also appointed to translate the first psalm in Hebrew, and the Greek New Testament *ad aperturam libri*, and to be examined in systematic theology, and on the sixteenth century of ecclesiastical history.

"The presbytery thereafter proceeded to take Mr. Murdoch's trials in Greek, Hebrew, theology, and ecclesiastical history, as prescribed; and Mr. Murdoch having been removed, the presbytery unanimously sustained the same; he was called in, and the judgment of the presbytery intimated to him by the moderator.

"The presbytery agreed to adjourn to one o'clock, and the *sedes* closed with prayer."

"Kelso, June 1st, 1836.

"The presbytery met agreeably to adjournment, and was constituted, &c.

"The presbytery proceeded to hear Mr. Murdoch's exegesis and exercise and addition, which they unanimously sustained as part of his trials."

"The presbytery then agreed to adjourn this meeting to the 14th current, at eleven o'clock forenoon, and instructed the clerk to intimate the same to absent members. The *sedes* closed with prayer."

"Kelso, June 14th, 1836.

"The presbytery met, &c.

"The presbytery proceeded to take Mr. Murdoch's remaining trials. He read a homily and lecture on the * subject prescribed, both which documents were sustained by the presbytery; and Mr. Murdoch being called, the same was intimated to him by the moderator. The presbytery then heard Mr. Murdoch's popular sermon; and he being removed, they proceeded to take a conjoint view of all his trials, which were unanimously sustained, and the same intimated to him by the said moderator. He was then asked judicially whether he was willing to sign the confession of faith when required, and answered in the affirmative. There was produced and read a mandate from the trustees and elders of the Low meeting at Berwick to wait upon the presbytery, as a deputation to express to them their thanks for the promptitude with which the presbytery had taken the necessary steps towards the settlement of their minister. The presbytery then appointed their moderator to preside at the ordination of Mr. Murdoch, to take place this day, in the church of Kelso, and public worship to begin at one o'clock. Whereupon the presbytery, with Mr. Sym, one of the ministers of Edinburgh, proceeded to church, and, after sermon by the moderator on 2 Thes. chap. i. verse 2, middle clause, in words, 'And fulfil the good pleasure of his goodness,' the presbytery, with the correspondent, did solemnly ordain Mr. Murdoch to the office of the ministry, and there gave him the right hand of fellowship."

Nor will it perhaps be superfluous here to mention the General Assembly's Act of 31st May, 1813, respecting the licensing of probationers, and its Act concerning probationers of 22d May, 1711, especially the formula. (a)

These documents lead by themselves, perhaps, necessarily * 95 to the inference that it was in the character of a * person in communion and in connection with the Established Church of Scotland—in the character of a person qualified by doctrine,

(a) See 2 De G. & Sm. 176.

opinions, and conduct to be one of her ministers — that Mr. Murdoch was elected to be the minister upon this foundation, and that he became so in the character of an actual minister of the Established Church of Scotland.

He seems to have continued, outwardly and apparently at least, and perhaps sincerely, to be in the same communion and connection, and at peace and in harmony, with the Established Church of Scotland, and to all intents one of her recognized ministers, until the schism and disruption, to which I must now refer, stating preliminarily, though perhaps superfluously, that, in every instance in which I have mentioned, or shall mention, the Established Church of Scotland, I mean, of course, that church in a Presbyterian state; and that, whenever I shall use the word “Presbyterianism,” or the word “Presbyterian,” their sense with me is to be taken as Trinitarian, and not Socinian.

In the year 1843 (as it is well known), a great secession from the Established Church of Scotland, which had for some time been impending, took place, an occasion upon which the General Assembly of that church framed and promulgated their enactment of May, 1843, stated at length with substantial, if not perfect, accuracy, in the report by Mr. De Gex and Mr. Smale, of the case of the *Attorney-General v. Munro*, a case not the same exactly as the present, “*nec diversa tamen*,” or if diverse, perhaps not widely so, nor perhaps without some common points, though it would probably be hard and unjust to these appellants to liken them, or their conduct, to some of the persons, or some of the conduct, that I had brought before me there. It must, I * think, * 96 be inferred and believed that of this enactment of May, 1843, Mr. Murdoch disapproved thoroughly, avowedly, publicly. He attended and participated in the meeting or assembly called the synod of the Presbyterian Church in England, which took place at Berwick, in Hyde Hill chapel itself, in April, 1844, and concurred, actively concurred, in certain overtures carried unanimously, adopted unanimously, by that meeting or assembly, and, if it was a synod (as it professed to be), by that synod. The carrying of those overtures became immediately notorious; among their contents are these passages: —

“Wherefore, the associated presbyteries constituting this church, in synod assembled, acting upon their own authority, as

set down in the premises, and possessing the same right and power now to alter, as at the first to assume, their present designation, hereby resolve, decree, and declare that the designation of this church shall, from this time forth, be 'the Presbyterian Church in England;' as also this synod further resolves and declares, that being and continuing the same corporate body it has hitherto been, unchanged in doctrine, discipline, government, or mode of worship (in respect of all which, each member of this synod solemnly adheres to his ordination vows, and will continue, through grace, steadfastly to maintain and adhere to the same), the Presbyterian Church in England will continue to assert all its lawful claims, and to maintain all its lawful possessions, rights, and privileges, of what sort soever they be, as the same have been hitherto claimed or possessed by this church.

"Second. That this church shall, through the grace of Almighty God, as an independent branch of the church of * 97 Christ, and in virtue of its own inherent powers of *self-government and jurisdiction, administer its religious ordinances, make its own disciplinary and ritual regulations, and exercise its spiritual jurisdiction, and, further, maintain inviolate all the rights, powers, and privileges wherewith Christ has invested it, in all matters, according to the premises.

"Third. That, in all acts of intercourse with another branch or other branches of the Church of Christ, or in forming or maintaining a friendly relation or relations with such branch or branches of the church of Christ, this church shall assert, provide for, and maintain its own freedom and independence in all matters spiritual, according to the premises."

The next overture taken up was the following on non-intrusion and spiritual independence:—

"Manchester, 27th March, 1844.

"Which day the presbytery of Lancashire, being met and constituted, *inter alia* the presbytery unanimously agreed to transmit the following overture to the synod; viz.,—

"It is hereby humbly overtured to the very reverend the synod of the Presbyterian Church in England, by the reverend the presbytery of Lancashire, to adopt the following declarations, protest, and testimony, or other similar intention.

"The synod of the Presbyterian Church in England, having taken into their prayerful consideration the events which, since their last meeting, have taken place in Scotland: events which have issued in the disruption of the Established Church of that country, and in the secession from the pale of more than a third of her most learned and most godly ministers, and of a still larger

* proportion of her elders and members, considering also the * 98 magnitude of the interest involved, the importance of the principles contended for, and the maxims of law and policy on which the civil powers of the empire have decided against the claims and the rights of that church, and the modes and measures by which such adverse decisions were carried into execution; maxims of law and policy which militate against the rights and liberties, not only of established churches, but of all churches, yea, of all individuals whatever; and feeling the deepest sympathy with those ministers, who, for conscience' sake, have made so glorious a sacrifice of their worldly goods; feeling also the most reverend regard for the honour of Jesus Christ, the only King and Head of his Church, and restored, through grace, to maintain, in all its integrity, the whole system of revealed truth, and the rights and liberties of Christ's kingdom; moved by a prayerful consideration of the premises, the synod of the Presbyterian Church in England feel themselves imperatively called upon, in the sight of God and the nations and the universal church, to make and to issue (as now also they hereby do) the following declarations, protest, and testimony, that is to say."

[The declarations were set out in the overture, and were to the effect that there was no other head of the Church than Christ, that the civil magistrate might not assume to himself the administration of the word, and that, as necessary corollaries from these professions, no power external to the Church had a right to rule in the spiritual affairs of Christ's kingdom, or to interfere with the administration of the same by those to whom it was committed by the Lord Jesus.]

The overture continued thus:—

* "Such' being the fundamental articles of their faith, the * 99 synod of the Presbyterian Church in England protest and lift up their testimony against the power assumed by the supreme

Civil Courts in Scotland, and sanctioned by the highest civil tribunal in the State, viz., a power to interfere with or deny the right of church officers to judge of and decide upon the claims and qualifications of candidates for membership in the church; to interdict Church Courts from electing their representatives to the supreme ecclesiastical assembly, and from meeting together for the administration of the affairs of Christ's kingdom; to interdict Church Courts from exercising discipline upon delinquent members, whether lay or clerical, according to the laws of Christ and his church; to issue compulsitors, requiring Church Courts, under civil pains and penalties, to ordain (or what is tantamount to compulsitors, to ordain) to the holy ministry parties who were not called nor found qualified; and on the other hand, to issue interdicts forbidding, under civil pains and penalties, Church Courts to ordain and admit to the holy ministry parties who were called and found qualified, according to the laws of Christ and his church; and, in one word, to usurp a power *in sacris*, and claim and exercise jurisdiction in spiritual matters: all which usurpation of the rights and prerogatives of Christ and his church officers by the civil powers, the synod of the Presbyterian Church in England protest against as Erastian, opposed to the declarations of the word of God and the standards of his church, and alike subversive of the fundamental rights and constitutional liberties of Christ's kingdom, and incompatible with the legitimate powers and proper functions of the civil magistracy, whether subordinate or supreme.

"We also, the synod of the Presbyterian Church in Eng-
 * 100 land, declare that it is a fundamental article in the * ecclesiastical polity laid down in the standards of the Church of Scotland, which are *pro tanto* standards of polity in this church, that it appertaineth to the people, and to every several congregation, to select their own minister (First Book of Discipline, chap. iv. § 2), or, at the least, that no man is to be intruded into any of the offices of the kirk contrary to the will of the congregation to whom they are appointed (Second Book of Discipline, chap. iii. § 5); and consequently, that the Word of God, and, by the constitutional principles of the Presbyterian Church, every congregation hath an efficient voice, either elective or concurrent, in the appointment of their ministers: a voice, however, of which they have of late years been repeatedly deprived in the Established Church of Scotland; wherefore, the synod of the Presbyterian

Church in England, acting upon the catholic and scriptural maxim, that, when one member suffers, all the members should suffer with it, hereby protest and lift up their testimony against such intrusion of ministers into parishes contrary to the will of the congregation ; against every attempt to deprive the people of their right by all constitutional means ; to object to and oppose the intrusion of unacceptable presentees, and against every attempt to compel Church Courts to ordain ministers to parishes, contrary either to their own convictions of what is right and proper, or to the valid objections of the people to such ordination and appointment, such being in direct violation of the rights and liberties conferred by Christ upon the ministers and members of his church.

“ And further, the synod of the Presbyterian Church in England deeply deplore that the Church of Scotland, as by law established, should, either by tacit acquiescence, or by overt act, have submitted to the Erastian usurpation of the civil power in spiritual matters, which * this synod cannot regard in any other light * 101 than as a sinful concession and compromise of most sacred principles, and a grievous dereliction of duty before God, against which they are bound to protest and lift up a testimony ; and while they protest against the usurpation and deplore the submission, they, at the same time, pray that the God and Father of our Lord and Saviour Jesus Christ would return and visit that once noble vine ; that he would pour upon the ministers and members of the Church of Scotland, as by law established, a spirit of repentance, prayer, and of supplication, and enable them all to hear and obey the voice of him who is still recognized in her standards as her only King and Head, saying, in his holy word, ‘ Remember therefore from whence thou art fallen, and repent, and do thy first works ; or else I will come unto thee quickly, and will remove thy candlestick out of its place, except thou repent.’ Rev. ii. 5.”

[The overture, after proceeding to express the sympathy of the Presbyterian Church in England with the Free Church in Scotland, stated that the synod of the Presbyterian Church in England appointed that a copy of that declaration and protest should be presented to the next meeting of the General Assembly of the Free Church of Scotland by a deputation ; and the record of the proceeding continued by stating that the overture was unanimously adopted.]

Soon after these Berwick proceedings, the General Assembly of

the Established Church of Scotland enacted, first, the Act of 27th May, 1844, and then that of 2d June, 1845, both set forth at length (and I believe without material inaccuracy) in the report of the *Attorney-General v. Munro*, already referred to.

The answers in the present cause of the appellants contained these passages : —

* 102 “ Say that though for any practical purposes it was altogether unnecessary for these defendants or for any persons connected with the said Low meeting-house to come to any conclusion on the points in difference between the said Free Church and the present Established Church of Scotland, yet these defendants admit that, as a matter of speculative opinion which could not in any way influence their conduct in reference to the trusts of the said indentures hereinbefore and in the said information and bill mentioned, these defendants, and as they believe the whole of the congregation of the said Low meeting-house with the exception of the said plaintiffs, and a very few other persons, were and are of opinion that as to the said points of difference the said Free Church were in the right, and in particular this defendant A. Murdoch admits that he, as a pastor of the said congregation, entertained and expressed the same opinion, and that he and his congregation generally entertained and expressed sympathy with the members of the said Free Church in the difficulties in which they were placed by being deprived of the establishment; but that this defendant and a large majority of the congregation were, and as these defendants believe still are advocates of a church establishment, though they entirely disapproved of the right of the State or patron to intrude ministers or pastors on congregations against the will of the people, and the interference of the civil power with the church in merely spiritual matters.

“ Say that under the circumstances hereinbefore mentioned a synod called the synod of the said Presbyterian Church of England in connection with the Church of Scotland, was held on the 16th April, 1844, at the Low meeting-house in Berwick-upon-Tweed as in the said information and bill mentioned, and that the

said presbytery of Berwick was represented at, and such
 * 103 presbytery * did form part of, the said synod, but at the meeting of the said synod the connection of the said synod with the Church of Scotland as by law established was not deter-

mined or dissolved as in the said information and bill mentioned, or any otherwise than as hereinbefore is mentioned.

“ Say that under the circumstances hereinbefore mentioned, such overture or independence as in the said information and bill mentioned was presented to and adopted by the said meeting of the said synod, and such overture was in the words in the said information and bill mentioned and set forth so far as the same are therein set forth ; and that the said synod did call for an overture on the independence of the church, and the same was read and pronounced correct according to the tenor or terms thereof ; and that at the said meeting of the said synod the overture on a declaration of principles on spiritual independence was called for and read, and the clerk having spoken in support of the same did move in the terms thereof, and that such motion having been seconded by this defendant A. Murdoch was carried unanimously, and that the name of the said synod was under the circumstances hereinbefore mentioned then altered by the said resolution of the synod by omitting in the title thereof the words ‘ in connection with the Church of Scotland.’ ”

“ Says that he thinks it probable, although he has no distinct recollection of that particular fact, that he did state to the said William Grant on the occasion of his conversation with him as aforesaid, that he should decline to accept a presentation to a church in Scotland if it were offered to him, but not to a living ; for these defendants say, that the term living is not used in Scotland, but this defendant A. Murdoch for himself says, and the other defendants say, they believe it to be true that * this * 104 defendant A. Murdoch has expressed his opinion that the expression Protestant dissenters, used in the deeds relating to the said Low meeting-house, comprised dissenters and dissenting ministers of every denomination tolerated by law, and that the deeds did not even restrict the trusts expressed in the deeds for the benefit of Presbyterians ; and that this defendant A. Murdoch also stated that so far as the expression Protestant dissenters was concerned, the congregation and their ministers might be any thing but Episcopalians, who are not dissenters ; Papists, who are not Protestants ; or Puseyites, who are a composition of both ; and that in expressing such opinion this defendant Alexander Murdoch stated that he had referred simply to the term Protestant dissenters used in the deeds.”

" Say that under the circumstances in their said former answer mentioned, this defendant Alexander Murdoch has invited and permitted ministers of the said Free Church, and of the said Presbyterian Church in England, to officiate, to preach, and to administer the sacraments in the said Low meeting-house, and that Mr. Robert Cowe, Mr. John Turnbull, and Mr. George Fulton Knight, in the said information and bill respectively mentioned, have renounced the benefits of the establishment, but have not as these defendants believe seceded or left the said Established Church of Scotland, but they have joined the said Free Church, and that they are now ministers of the said Free Church, and that all of them have since their said alleged secession from the said Established Church of Scotland been invited and allowed by this defendant A. Murdoch, but not by any other of the defendants to the said amended information and bill, to preach and to administer the sacraments, and to join and concur therein in the said Low meeting-house; and that the said Robert Cowe was formerly

* 105 minister of * Whitsome, and that the said Mr. John Turnbull was formerly minister of Eyemouth, and that the said Mr. George Fulton Knight was formerly minister of Mordington, and that such parishes are parishes in Scotland. Say that under the circumstances in their said former answer mentioned, it is the fact that since the said disruption in 1843 not one minister of the Established Church of Scotland, except as in their said former answer is mentioned, has ever officiated in the said Low meeting-house. Say that before the said disruption such ministers did not constantly from time to time, though they did sometimes, but when in particular the defendants cannot set forth as to their belief or otherwise, officiate therein. Say that since the disruption the said Free Church have established a presbytery called the presbytery of Dunse and Chirnside, and that churches and chapels have since been built, and that ministers have been appointed to them in connection with the said Free Church; and that under the circumstances in their said former answer mentioned, such ministers and this defendant A. Murdoch have mutually officiated and preached in their respective churches and chapels, and that such ministers have not constantly, but occasionally, and not from time to time, but when in particular these defendants do not know and cannot set forth as to their belief or otherwise, officiated and preached in the said Low meeting-house, and this defendant A. Murdoch has

occasionally, and from time to time, but when these defendants do not know and cannot set forth as to their belief or otherwise, officiated and preached in such churches and chapels."

"Say they do not, nor do, nor does any or one of them pretend that this defendant A. Murdoch never was subsequently to his said ordination and induction into the said meeting-house a candidate for the office of minister * of a parish church or * 106 chapel in Scotland. Say that the contrary of such last-mentioned alleged pretence is the truth, and that he was in January, 1836, a candidate for the Church of Strolts, in the said amended information and bill mentioned, at Scholes; and that in 1838, and upwards of two years after such last-mentioned ordination and induction, this defendant A. Murdoch was one of twelve candidates for the first charge of the parish of Lesmahagow in the presbytery of Lanark in Scotland, of which the Duke of Hamilton was patron; and that such office was then vacant, and that this defendant A. Murdoch did officiate before the congregation of the said parish as one of such candidates in October in that year, and that this defendant A. Murdoch was not appointed to the charge."

"Say that under the circumstances and for the reasons herein mentioned, this defendant A. Murdoch does altogether deny all ecclesiastical obedience to the said Church of Scotland, and that he does insist that the said Presbytery of Berwick and the said Synod are alone his superiors in matters of church discipline, and these defendants make out the same as herein appears."

In the evidence, whether documentary or. parol evidence, there is not any thing that I have been able to discover leading or tending to a conclusion different, as concerning this part of the case, from that to which, in my opinion, the documents and circumstances that I have stated tend and lead,—a conclusion, namely, against the appellants.

It must necessarily, I think, on the materials before the Court, be taken that, before and at the time of the institution of this suit, which was commenced in the year 1846, Mr. Murdoch had ceased to be and no longer was a * minister of the Estab- * 107 lished Church of Scotland,—had ceased to be and no longer was qualified to be a minister of that church,—had ceased to be and no longer was in communion with her. But then comes

to be considered the proposition of the materiality of that state of things, the proposition affirmed by the relators and plaintiffs, and denied by the appellants, that by ceasing to be a minister of the Established Church of Scotland, by ceasing to be in connection with that church, by ceasing to be in communion with her, Mr. Murdoch became disqualified and unfit to continue or be the minister upon the foundation in question.

This point, depending on the evidence in the suit, considered with a due regard to the nature of the pleadings, is certainly, I think, not concluded by the deeds of 1717, 1719, 1734, and 1766, or any one or more of them, or any later deed; for I am clearly of opinion that neither the appellants' contention nor the respondents' contention is inconsistent with the language of any one of those instruments.

The litigants on each side say that the congregation in question is a congregation of "Protestant dissenters," and so has always been; and assert therefore that Master John Turner's congregation was a congregation of Protestant dissenters. The appellants and respondents differ, it may be, as to the meaning of the term. But that difference does not necessarily involve, does not necessarily imply, a contradiction of any one of the deeds on either side.

The affirmation or the denial that the minister on this foundation must needs be in connection or communion with the Established Church of Scotland, or must needs be a minister of
 * 108 that church, may well be maintained by * persons submitting to be bound by every word of each of the deeds.

It may then be right to refer to some portions of the doctrine stated by Lord ELDON in the case of the *Attorney-General v. Pearson*, where he is found thus expressing himself:—

"But there is another view, in which the case should be considered, and it is this,—that where an institution exists for the purpose of religious worship, and it cannot be discovered from the deed declaring the trust what form or species of religious worship was intended, the Court can find no other means of deciding the question than through the medium of an inquiry into what has been the usage of the congregation in respect of it; and if the usage turns out upon inquiry to be such as can be supported, I take it to be the duty of the Court to administer the trust in such a manner as best to establish the usage, considering it as a matter

of implied contract between the members of that congregation. But if, on the other hand, it turns out (and I think that this point was settled in a case which lately came before the House of Lords, by way of appeal out of Scotland), that the institution was established for the express purpose of such form of religious worship, or the teaching of such particular doctrines as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time to alter the purpose for which it was founded, or to say to the remaining members, 'We have changed our opinions—and you who assemble in this place for the purpose of hearing the doctrines, and joining in the worship prescribed by the founder, shall no longer enjoy the benefit he intended for you, unless you conform to the alteration * which has taken place in our opinions.' * 109 In such a case, therefore, I apprehend—considering it as settled by the authority of that I have already referred to—that where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to as the guide for the decision of the Court, and that to refer to any other criterion—as to the sense of the existing majority—would be to make a new institution, which is altogether beyond the reach and inconsistent with the duties and character of this Court.

"In this view of the case it is of the first importance to see what the record before the Court says upon the subject of the original institution.

"It is also clearly settled that if a fund, real or personal, be given in such a way that the purpose be clearly expressed to be that of maintaining a society of Protestant dissenters,—promoting no doctrines contrary to law, although such as may be at variance with the doctrines of the established religion,—it is then the duty of this Court to carry such a trust as that into execution, and to administer it according to the intent of the founders. In this case it is impossible to doubt that the trust was originally created for the purpose of maintaining a Protestant dissenting institution; and it would be doing violence to the intention of the parties to these deeds to say that the worship and service of God being the object expressed by them the trust must be administered in such a way as to maintain the religion of the Established Church. Nevertheless, I take it from the experience of many years in this

Court, that if any body of persons mean to create a trust of land or money in such a manner as to render the gift effectual, and to call upon this Court to administer it according to the intent of the foundation, whether that trust has religion for its object or
 * 110 not, it is incumbent * on them in the instrument by which they endeavour to create that trust to let the Court know enough of the nature of the trust to enable the Court to execute it; and therefore where a body of Protestant dissenters have established a trust without any precise definition of the object or mode of worship, I know no means the Court has of ascertaining it except by looking to what has passed, and thereby collecting what may by fair inference be presumed to have been the intention of the founders.

“And with respect to the clause which invests the trustees or the major part of them with the power of making orders from time to time upon matters relating to the meeting-house, I think it would be doing violence to all the principles of construction upon which we act to understand it as meaning that those trustees or the major part of them should have power to convert that meeting-house, whenever they thought proper, into a meeting-house of a different description and for teaching different doctrines from those of the persons who founded it and by whom it was to be attended; I say that appears to me to be as inconsistent with the probable meaning of the original founders as it would be to hold that they meant it should be converted, at the discretion of the trustees, into a place of worship according to the form and doctrines of the Church of England.

“Upon the provisions of this deed there arises a question (upon which usage will have great effect), whether, according to the original constitution of this society, the minister, preacher, or pastor could be appointed for three years only, or whether, according to the general principles of this body of dissenters, the congregation and minister might agree that the one will give and the other accept a nomination for three years only. It appears

highly probable that the person who gave this part of the
 * 111 * fund contemplated a provision for the minister for his life, since he has expressly given it to him for life, even when he could no longer officiate as minister; but on the other hand it may turn out to be established by usage that he was only a temporary minister elected with the concurrence of the congregation,

and liable to be removed in the same manner as he was called upon to officiate."

It is to be observed, that (subject possibly to the question, if it is a question, whether Erastianism, or an opinion favourable to Erastianism, or analogous to Erastian views, is an opinion belonging to religious belief or religious doctrine) the dispute before us is not one that concerns religious belief or religious doctrine, or, except as to the qualification of the pastor or minister, the form or manner of conducting divine worship.

But it cannot, I think, be considered that the manner of conducting divine worship is not at all touched by the question to what church, in point of discipline, the minister belongs, or the question whether, through his own conduct and proceedings, he has ceased to be a member of that church of which, when chosen, he professed, and must, by the electors, have been thought to be, a member. Nor, if the manner of conducting divine worship is not so touched, does it seem to me that Lord ELDON's doctrine is inapplicable to the mere qualification of the minister in other respects than those points of opinion upon which the plaintiffs and defendants here are agreed. Now, it appears to me to be a just inference from the pleadings and evidence, and to be a fact established, that the congregation in question was, at the time of its original foundation in the latter half of the seventeenth century, and has thenceforth to the present day continually been, in theory, opinion, views, and profession, Presbyterian. Indeed, in a very early part of * the appellants' first answer, they state their * 112 belief "that the doctrines, government, and discipline" of this "congregation, from the time of their first assembly down to the time of putting in that answer, have always been such as were held and maintained by the Presbyterian Church in England" in the year 1685, and such as are contained in the standards called in the same answer the Westminster standards, and which standards (it states) "are also the standards of the Church of Scotland as formerly and as now established."

It appears to me proved also that, during fifty years (at least) next before the election of Mr. Murdoch, and during sixty years (at least) next before the commencement of this suit, the uniform course, usage, and practice of the congregation in question, and its trustees,—the uniform plan and system upon which the property

in question has been administered by the persons claiming for the time being under the conveyance of 1734,—were, as concerning the choice, appointment, ordination, and settling of the pastor or minister, in accordance and conformity with the course pursued as already mentioned, when Mr. Murdoch was elected, appointed, ordained, and settled, and therefore support (I do not say conclusively establish) the contention of the relators and plaintiffs in this respect.

It must upon the evidence be taken that for full fifty years next before Mr. Murdoch's election, for full sixty years next before the institution of the suit, during which period more than five pastors or ministers have been chosen and appointed, each one of them who preceded Mr. Murdoch was, when chosen, a licentiate of the Established Church of Scotland, or an ordained minister of that church,—was, when first settled in the office, an ordained

* 113 and a recognized minister of that church, and * so continued while in connection with this foundation. Then, with regard to the period, more than fifty years before Mr. Murdoch's election, and more than sixty years before the commencement of the suit, Mr. Ogle (an Englishman, I believe, who held the living of Berwick at the time of the death of Oliver Cromwell, and was, upon or soon after the Restoration, ejected from it) seems to have been the founder and first pastor or minister, or at least the first pastor or minister, of this congregation, which may safely, I think, be taken to have had its origin and commencement between the Restoration and the Revolution. He died in the year 1696, I believe, and seems to have been immediately or otherwise succeeded in the office of its minister by Mr. John Turner, whose name is mentioned in the conveyance of 1766, probably an Englishman also. He died, I think, in 1760, and was succeeded immediately, or otherwise, by Mr. Gardner, who died, I believe, between 1777 and 1781, and whose immediate successor was Mr. Aitchison, who was or had been a licentiate certainly of the Established Church of Scotland, and seems to have held the office of pastor or minister on this foundation for a period of fifteen years and upwards, commencing from the year 1781, or earlier. Of these gentlemen there is not, I think, the least reason to believe that any one was an Episcopalian; or not a Protestant dissenter; or not in theory, not in opinion, not in profession, or not, so far as possible, in practice a Presbyterian.

The question, then, appears to be, whether it was originally, or had, before the election of Mr. Murdoch, become, in an effectual manner, a private law or governing and binding regulation of this congregation — of this religious institution and foundation — that its minister or pastor at all times should be in communion with the Established Church of Scotland, — should be, or have been, * a licentiate of the Established Church of Scotland, * 114 and should be a minister of that church. I understand, however, the appellants to contend, in effect, not only that there is no such private law, no such governing regulation, but, moreover, that none such could effectually have been made, unless before, or contemporaneously with, the original formation of the congregation in the 17th century, or at least before or contemporaneously with the acquisition of the meeting-house, or its site, for the purposes of the congregation. To this I do not agree. It appears to me to be competent to a congregation of dissenters, acting unanimously, and with the concurrence, where they have trustees, of those trustees, to introduce effectually into their system and constitution new regulations, from time to time, — regulations, at least, not in contravention of any deed of trust or of foundation, not subversive of the original system or constitution, not opposed in principle to it.

Whether the unanimous votes of an entire congregation, and their trustees, could be of such force as to convert a Trinitarian into a Socinian foundation, a Protestant into a Popish, a Presbyterian into an Episcopalian, institution, is not a point before us.

The congregation and foundation to which this suit relates were originally, are, and have ever been, Presbyterian; nor is any thing sought by the information and bill, or done by the decree, not consistent with Presbyterianism, or not within Presbyterian limits. My opinion is, that upon the assumption (for the purpose of the argument), that before the year 1720, or before the year 1767, it was not necessary that the pastor or minister of this congregation should be, or have been, a licentiate of the Established Church of Scotland, should be a minister of the Established Church of Scotland, or should be in a * state of communion with * 115 that church, it was competent to the entire congregation for the time being, acting unanimously, and with the concurrence of their trustee or trustees, if any, for the time being, to resolve and agree effectually (I am not saying irrevocably), that every future minister or pastor should be a person in communion with

the Established Church of Scotland, should be, or have been, a licentiate of the Established Church of Scotland, and should be a minister of that church. Such a resolution, such an agreement, was not, nor would be, to extend or change, though it was, or might be, to restrict, the class from which the minister or pastor of the congregation was to be chosen ; nor could such a restriction, whether likely or unlikely to be approved by all rational and pious Presbyterians, be, in the unquestionable circumstances of the case, considered absurd or necessarily mischievous, necessarily inexpedient, or necessarily unprincipled.

I think it to be a just and correct inference from the whole of the admissible evidence, that long before the vacancy caused by the death of Mr. Murdoch's immediate predecessor upon this foundation, Mr. Crambe, — because before Mr. Crambe's appointment or election, — it was determined by the congregation, — the whole of the congregation for the time being, — approved by the trustee or trustees of the property for the time being, and agreed effectually so as to bind the property (I do not say irrevocably), that the minister for the time being on the foundation should always be, or have been, a licentiate of the Established Church of Scotland, should always be an ordained minister of the Established Church of Scotland, and should therefore necessarily be a person in full communion with that church. I use the term "ordained minister," not as mean-

ing of necessity a person having previously had a parish, or,
 * 116 if * the phrase may be allowed, a cure of any kind or any charge or office.

The effect which, whether by way of evidence or presumption, or otherwise, a continued and unbroken usage during a considerable number of consecutive years, has in this country on rights of property, or questions concerning property, in various instances is well known, and the present is a controversy about property.¹

Whether it is affected by the Statute 3 & 4 Will. 4, c. 27, or by the principles on which the case of *Lord Cholmondeley v. Lord Clinton (a)* (as decided by Sir THOMAS PLUMER and the House of Lords), or *Stocker v. Birney*, (b) *The Mayor of Hull v. Horner*, (c) *Beckford v. Wade*, (d) *Gibson v. Clark*, (e) *Chalmer v.*

(a) Turn. & R. 107; 4 Bli. 1.

(b) Ld. Raym. 741.

(c) Cowp. 102.

(d) 17 Ves. 87.

(e) 1 J. & W. 159.

¹ See *Lewin Trusts* (5th Eng. ed.), 401; *Attorney-General v. Clapham*, 4 De G., M. & G. 626.

Bradley, (a) *Doe v. Cooke*, (b) *Doe v. Lawley*, (c) *Doe v. Barnard*, (d) or any other case belonging to either of the same classes, was decided, I do not express an opinion further than I have done, nor is it necessary that I should. But certainly I view the observations of Lord ELDON, in the *Attorney-General v. Pearson*, as not without bearing on the present cause. That the appellants are defendants is not, I think, a circumstance either in their favour or against them, with respect to the manner in which the dispute between them and the respondents ought to be dealt with. All the parties to the cause seem to be alike *de facto* in possession of the subject in controversy. I do not except even the Attorney-General, considering the interest of which he stands as the representative in the suit. The appellants say that * Mr. Murdoch * 117 is entitled to continue to officiate in the meeting-house as the minister of its congregation. But if he is so, that right, that title, is probably one capable of assertion effectually in a Court of Equity only, if anywhere.

Supposing that to be so, I apprehend that the rules applicable to the case of a man who, if he has a title, has one capable of effectual assertion at law, do not necessarily apply to Mr. Murdoch's case.

It has been suggested that the proximity of Berwick to Scotland, and the legal state and social condition in which as to religion, during the latter half of the seventeenth century and the whole of the eighteenth, Scotland and England respectively from time to time were, ought to be considered sufficient to account for the constant practice, during the sixty years next preceding the suit, of having as ministers or pastors upon this foundation such persons as during that period were so, on the appellants' theory, as distinguished from that of the relators and plaintiffs. To this view or argument, however, I find myself unable to accede, considering especially the support which the same facts may be reasonably argued to afford to the case of the relators and plaintiffs. It may be true, that if we suppose a case of an office requiring to be filled by a man of learning, which during sixty consecutive years and more has been uniformly filled by a graduate, for example, of the University of Oxford, it might be unsafe therefore to hold that only a graduate

(a) 1 J. & W. 57.

(c) 3 Nev. & M. 331.

(b) 7 Bing. 346.

(d) 1 Esp. 11.

of Oxford could be appointed; and other such examples or cases might easily be suggested. But the circumstances of the particular occasion or instance must always be attended to. Long practice or usage as to one subject may be of more or less force than long practice or usage as to another. The person having

* 118 *judicially to decide on the fact, on the weight of circumstantial evidence, on the inference to be drawn from a series of events, must form the best estimate judicially that he can of the mass of materials before him, and all its particulars, and come to a conclusion accordingly.

On the whole, the pleadings and evidence now before this Court leave me in no state of uncertainty what are the trusts to which the property in dispute is subject, so far at least as the disqualification of Mr. Murdoch is concerned,—leave me in no state of doubt whether a breach of trust has been committed by the appellants. Upon this my deliberate view of the pleadings, this my deliberate estimate of the evidence, I am bound to act; and—it not being possible, I think, to deal with the cause otherwise than in one of these five ways; namely, to declare the office of minister or pastor vacant, and do substantially no more; or to direct an inquiry as to the true nature of the trusts to which the property is subject; or to direct a scheme for its management and administration; or, fourthly, to dismiss the information and bill; or, fifthly, to affirm the Vice-Chancellor's decree, or make one not importantly different from it—I must conclude thus: as to the first, it would probably leave the litigants in scarcely a better state on either side than when the dispute began, and would be, I conceive, to do justice defectively. As to the second, considering the small amount of property in dispute,—considering the exertions already made to procure evidence; considering the quantity of testimony, oral and documentary, now before us,—and considering the heat, eagerness, and animosity generally produced by conflicting endeavours at a perfect state of Christian discipline (a condition from which the present controversy seems to form no exception), I am of opinion that the due administration of justice does not require that any further investigation

* 119 should take place. * Thirdly, upon the same grounds, I am of opinion that a scheme should not be directed. In the fourth place, I am not of opinion that the information or bill can with propriety be dismissed wholly or partially. There re-

mains, then, but the course of affirming the Vice-Chancellor's decree, or varying it only in a manner not important.

I think it better and right to affirm it wholly, for I do not accede to the observations so ably made by the appellants' counsel upon the subject of costs, whether as to the Dumfries question or otherwise.

With regard, however, to the form and language of the decree, it contains some expressions which, if it had been my province originally to make it, I should perhaps not have used without some change or qualification or explanation. I refer to the phrase "the model of the Established Church of Scotland," and the phrase "licentiate and recognized minister of the Established Church of Scotland, and in full connection with that church." Still I am not sufficiently persuaded that either phrase is inaccurate, or needs either any qualification not contained in the decree, or any explanation not afforded by the decree, to render it incumbent on me or proper for me (as I think) to say that the decree in either of these respects ought to be varied, considering the decree, as I do, to be certainly correct in all others. I should add that, with regard to the two phrases which I have just been quoting, I read and understand the former as meaning "the model of the Established Church of Scotland, so far as possible consistently with the fact of Berwick-upon-Tweed being in England," and the latter thus: A person may, I think, be a licentiate of the Church of Scotland within the meaning of the decree, although
 * having ceased to be a licentiate of that church in the * 120 sense and by reason merely of having become one of her regularly ordained ministers. I conceive that the word "recognized" as used in the decree means "ordained," that is to say, "regularly ordained;" and when I say "regularly ordained," I mean of course "duly ordained according to the rules and course of the Established Church of Scotland." I think, moreover, that the phrase imports that the character or authority conferred by the ordination must not have been taken away or ceased to exist. I am of opinion also that a man may be a "recognized minister of the Established Church of Scotland" within the meaning of the decree, whether duly ordained according to the rules and course of that church before and independently of his appointment or election to the foundation in question, or so ordained only upon the occasion of, and with reference to, that appointment

or election ; and I read and understand, lastly, the word “ connection ” as used in the decree to mean neither more nor less than “ communion.”

The petition of appeal will, therefore, under the statute constituting our office, stand dismissed. The costs of the appeal, however, will depend on my learned brother’s view of the matter ; for, though I am disposed to give them against the appellants, I apprehend that unless he shall concur in doing so they cannot be given.

I have not hitherto mentioned a statute to which reference was made during the argument, the Act of the 7 & 8 of the Queen, c. 45 ; for my opinion upon this appeal has not been guided or affected by it. I may say, however, that the case of the appellants is clearly in my judgment not assisted by that statute ; but is, perhaps, one against which the statute opposes an insuperable bar.

* 121 *THE LORD JUSTICE LORD CRANWORTH.—The principal question in this case is one of fact rather than of law. What were the purposes for which the founders of the Low meeting-house in 1719 subscribed their money ? For as the rights of the parties are not, so far as I can discover, touched by the Statute of 7 & 8 Vict. c. 45, the meeting-house must, according to my view of this case, continue to be used for the same purpose at the present day.

Where the trusts on which the chapel has been founded, have at or about the time of the foundation been declared in writing, there is not in general much difficulty in carrying them into execution. But where no such writing exists, where the Court is left to find out from mere subsequent usage what were the original purposes of the foundation, what was the doctrine which the founders considered essential to be preached, what the discipline which they considered essential to be followed, the task often becomes one of great difficulty. There will indeed in general be some prominent and leading points as to which no doubt will exist. If, for instance, in a particular chapel the doctrine preached has, as far back as living memory can go, been uniformly consistent with what has been called orthodox dissent, that is to say, has been based on the doctrine, amongst others, of the Trinity, there can be no difficulty in coming now to the conclusion as a matter of fact, that the maintenance of that doctrine formed an essential

part of the objects for which the chapel was founded. That to preach Socinianism, or modern Unitarianism, would be in contravention of those objects, and so a use of the chapel which this Court would not permit.¹ This would, I think, be a legitimate and reasonable inference, independently of the consideration that the Toleration Act * did not extend to those who denied * 122 the doctrine of the Trinity. The ground on which such an inference rests would be just as applicable to a chapel which (there being no declaration of trust) having been always, so far back as evidence could go, used by a congregation of Baptists, should now fall into the hands of those who should preach and maintain the lawfulness and expediency of infant baptism. In all such cases the first inference is, that the same doctrines which, *ex hypothesi*, have been maintained in the chapel as far back as evidence can go, had been always those maintained from the time of the foundation. And, secondly, considering the vast importance which the founders must have attached to those doctrines, that the preaching of them must have been the objects, or one of the objects, for which the chapel was intended. No difficulty exists so long as we have to deal with these great primary objects of such a foundation.

But it is obvious that the same reasoning will not apply, where we have to draw inferences on minor matters. To put, for instance, an extreme case the other way. Suppose the hours of divine service, at any particular chapel, had always been at ten in the forenoon, and two in the afternoon, but that a majority of the congregation should now desire to have this altered, and that the service should now be an hour later than heretofore. It would surely be a very strained inference to draw from the fact of the service

¹ "From the earliest days of Christianity they [Trinitarianism and Unitarianism] have always been deemed, as they have been in our day, antagonist systems. And Courts have decided that funds given to support the teaching of one of them, are misemployed and perverted when applied to support the teaching of the other, and have redressed such misemployment." Per METCALF, J., in *Princeton v. Adams*, 10 Cush. 129, 132. See *Attorney-General v. Pearson*, 3 Mer. 353; *Shore v. Wilson*, 7 Sim. 290; 9 Cl. & Fin. 355; *Attorney-General v. Shore*, 7 Sim. 309, note; 11 Sim. 592; 16 Sim. 210; *Attorney-General v. Drummond*, 1 Con. & Law. 210; 1 Dru. & War. 353; 2 H. L. Cas. 837; *Attorney-General v. Hutton*, 7 Ir. Eq. 612, 614; *Miller v. Gable*, 10 Paige, 627; 2 Denio, 492; *Kniskern v. Lutheran Church, &c.*, 1 Sandf. Ch. 439; 2 Story Eq. Jur. § 1191 a; *Glasgow College v. The Attorney-General*, 1 H. L. Cas. 800; *Attorney-General v. Dublin*, 38 N. H. 459; *Attorney-General v. The Meeting-house in Federal Street*, 3 Gray, 57, 58.

having been always performed at a particular hour, that this was one of the original purposes of the foundation, and so that it would be a breach of trust to permit the chapel to be used at a different hour. In such a case, there would be no difficulty in saying, that the circumstance of the service having always been performed at a particular hour was a mere * accident, not in the contemplation of the founders, and so that it would be no breach of trust to permit the hours of divine service to be altered.

I have thus pointed out two extreme cases; in the first, inference from usage would, from the important nature of its subject-matter, be irresistible, that what had been uniformly done constituted an essential part of the original purposes of the foundation. In the other, the unimportant nature of the usage would prevent any such inference from arising. In such extreme cases there is little or no difficulty. But there are many intermediate cases, in which the application of the principles resulting from usage is by no means easy,—cases in which it is hard to say, whether what has been uniformly done, has been so done because it constituted part of the original objects of the founders, or merely because it has been thought from time to time the most convenient mode of carrying those objects into effect. I confess that some grave difficulties of this nature have presented themselves to my mind in considering what ought to be taken as the purposes for which this chapel was founded, and consequently as to what are the trusts on which the building is now held by the trustees. The nature of these difficulties I shall best explain by considering the precise terms of the material parts of the decree which was made in the Court below.

The decree begins by declaring that the property comprised in the indenture of the 22d day of May, 1719, and the chapel at Berwick-upon-Tweed, called the Low meeting-house, erected on part thereof, in the pleadings mentioned, are subject to the trusts, as to such meeting-house, for the appropriation of the same, * 124 as a church or place of public religious worship, on * the model of the Established Church of Scotland, and as to the residue of the said property, for the benefit of the congregation of the said meeting-house.

Now, to this part of the decree I entirely accede, understanding as I do the words “on the model of the Established Church of

Scotland," to mean only in the same mode in which worship is conducted by that church. It was indeed argued on the part of the defendants that there was nothing to show any original intention of confining the use of the chapel to any particular class of dissenters. Several books were referred to written by eminent dissenting divines, for the purpose of showing that, however strong the differences might at a previous time have been among the numerous bodies of Protestant dissenters, yet the effect of common suffering and persecution, previously to the foundation of this chapel in 1719, had been to smooth down all those asperities, and to induce the several sects to look at one another, rather as members of one vast united body of Protestant dissenters, than as distinct bodies of different denominations; and so to lead them to disregard the varieties of doctrine, separating them among themselves. And from these considerations it was argued, that the fair presumption of fact ought to be, that the chapel was originally built, not for any one particular class, as for instance Presbyterians, but for Protestant dissenters generally; and it was said, that this view of the case is confirmed by the circumstance, that in the conveyance to new trustees, by the deed of 1784, the property conveyed is described as a burgage and garden, on part whereof had lately been erected a house, then used as a meeting-house for a congregation of Protestant dissenters,—not designating dissenters of any particular denomination, but speaking generally of Protestant * dissenters. But I cannot say * 125 I feel at all affected by this argument. The property was aptly and sufficiently described, in the deeds of 1784, as a house then used as a meeting-house for a congregation of Protestant dissenters. The only reason for describing it at all was to identify the property intended to be conveyed. For that purpose the description adopted was quite sufficient, and it was neither necessary nor probable that such a deed should contain any statement, as to the nature of the doctrine preached, or the discipline followed within the walls of the building conveyed.

And, with respect to the suggestion, that at the time of the foundation of the chapel, Protestant dissenters were generally inclined to overlook the differences among themselves, and to consider it a sufficient bond of union, that they were opposed to the Established Church, I adopt the view taken by Vice-Chancellor WIGRAM.

However those principles might have prevailed in the case of a mere charitable gift, — in a trust, for instance, to distribute money among indigent dissenting ministers, or indigent dissenting poor, — it never could have prevailed in the case of persons founding a chapel. In such a case the inference is almost irresistible, that the founders must have contemplated the erection of a building, in which they would intend that principles of religious belief should be expounded, and religious practice be enforced, in the mode considered by them most consistent with true and genuine Christianity, and to which they had themselves been accustomed. I consider it, therefore, perfectly clear, that the object of the foundation was the erection of a building, in which religious services should be conducted, according to some definite form

* 126 of worship. The question, then, is, according to * what form? This also, appears to me to be free from all doubt, — according to the Presbyterian form. All the evidence shows that this has been the mode in which the worship has been conducted, as far back as there are any means of inquiry; and I am perfectly satisfied that this has been the case from the very date of the foundation, — and long before that date, by the congregation by whom the chapel was built.

I entertain no doubt but that the worship has been always conducted in conformity with “The Directory for the Public Worship of God,” by which the mode of worship in the Church of Scotland now is, and ever since the year 1690, has been, regulated. I am satisfied further that the conducting of the services, according to that mode, must have been the main, if not the only, object of the founders. On such a point I cannot suppose them to have been indifferent; and therefore I think the declaration in the decree, to which I have already referred, and which appropriates the chapel in question as a church or place of religious worship on the model of the Established Church of Scotland, is perfectly right, assuming that these latter words mean no more than, according to the directory for public worship used in the Established Church of Scotland. But the decree, after making this declaration, goes on to declare that no minister or other person is qualified for, or is competent to exercise the office of, minister or pastor of the Low meeting-house without being a licentiate and recognized minister of the Established Church of Scotland, and in full connection therewith. To this declaration I confess I cannot accede. I do

not think that the evidence justifies it. It imposes, as I think, a restriction on the future choice of ministers, for which I can discover no warrant. In the first place, I must remark, with reference to the particular language * used in this part of * 127 the decree, that I do not clearly understand its precise import. It requires every minister of the Low meeting-house to be not only a licentiate, but also a "recognized" minister of the Church of Scotland. I nowhere find any explanation of what is meant by a "recognized" minister of the Church of Scotland. But as no one can be a minister of the Church of Scotland who has not been ordained by that church, I presume that a recognized minister must mean one who has been ordained by that body, and who still continues to sustain the character of minister derived from such ordination. Whether, however, I rightly interpret these words is not material; for, as I do not think it is made out that the minister of the chapel must of necessity be a licentiate of the Scotch Church, I certainly do not, and cannot, think he must be a licentiate and recognized minister of it, whatever be the correct meaning of those latter words.

In order to sustain this part of the decree, the relators must, according to the view which I take of this case, make out, first, that in fact all the ministers of the Low meeting have, since its foundation, been licentiates and recognized ministers of the Church of Scotland (making due allowance for any occasional deviations from this general practice, which can fairly be attributed to accident or oversight); and, secondly, if the fact is made out, then that the reasonable inference is, that this connection with the Church of Scotland was one of the objects of the founders, to permit a departure from which would be a breach of trust.

Now, as to the fact, I will for the present merely say, that Mr. Smith, who became minister of the Low meeting-house in 1797, and the six ministers who have from * time to time * 128 succeeded him, were all ordained to this particular congregation, by some Scotch presbytery. Most of them, perhaps all, had previously been licentiates of the Scotch Church, though, as to some of them, that is by no means clear. James Aitcheson, who was the immediate predecessor of Smith, and who became minister in or about 1780, and was removed for misconduct in 1797, was certainly a Scotch licentiate, having been licensed by the presbytery of Selkirk in 1775; but I do not find any evidence

to show that he was ordained to the Low meeting-house by any Scotch presbytery.

With respect to the three ministers who preceded Aitcheson, namely, Turner who was minister at the date of the foundation in 1719, Campbell who succeeded him, and Gardner who succeeded Campbell, and was the immediate predecessor of Aitcheson, the evidence clearly shows Campbell to have been a Scotch licentiate, but I cannot say that it at all satisfies me as to either Turner or Gardner. I am not satisfied, as a matter of fact, that either of those persons were connected with the Scotch Church, either as licentiates or ordained ministers. But let it be assumed for the purpose of argument that they were; then arises the question, whether the connection of all the ministers with the Scotch Church is to be deemed an essential part of the objects originally contemplated by the founders, or is it to be attributed to accident or some other cause? I think that, even if all the ministers be shown to have been licensed by the Church of Scotland, still it will not be reasonable to infer that it was in the contemplation of the founders that this connection must always and, under all circumstances,

continue. I come to this conclusion from considering the
 * 129 history of Presbyterianism, as connected both with * England and Scotland, and the condition in which the founders of the meeting-house and those who have since from time to time formed its congregation have stood with reference to their religious wants.

When I speak of the history of Presbyterianism, I will, as far as possible, confine myself to that which may be collected without liability to error, from the law — or what for a time had the force of law — in this country, and from the laws of Scotland.¹ It appears from Scobell's Collection of Acts and Ordinances, passed from the commencement of the civil war up nearly to the death of Cromwell, that on the 12th of June, 1643, the lords and commons, then in fact exercising the functions of government, independently of and in hostility to King Charles the First, passed an ordinance convening an assembly of divines, to meet at Westminster, in order to take into consideration the liturgy, government, and discipline of the church, with a view to its amendment. That assembly accordingly met, and we know, not merely as matter of

¹ See Attorney-General v. Bunce, L. R. 6 Eq. 563.

history, but also from Acts of the General Assembly of Scotland, that commissioners from that country attended and formed part of the body of divines which so met at Westminster. One of the results of their deliberations was, the forming of a new directory for public worship, to supersede the Book of Common Prayer, then used in England; and by an ordinance of the lords and commons, passed in January, 1644, old style, it was ordained, that the new directory should be thenceforth used throughout England and Wales, instead of the Book of Common Prayer; and this was again enforced by another ordinance made on the 28d of May then next. In the following month of February, *i.e.*, February 1645, old style, the same directory was adopted by the General Assembly of the Church of Scotland, and by the Parliament * of Scotland, the Acts of both of those bodies expressly * 130 noticing, that it had been then already adopted by both Houses of Parliament in England. The same form of worship was thus introduced into both kingdoms, first into England, and afterwards into Scotland.

The assembly of divines at Westminster also framed a system of church government by means of assemblies, congregational, classical, and synodical, which the General Assembly of Scotland adopted a few days after they had accepted the new directory for public worship; namely, on the 10th of February, 1645, old style: and both the directory and the form of church government, so accepted, have ever since their adoption (except for about twenty-five or thirty years, during which Episcopacy prevailed), continued to be, and still are, the authorities regulating the mode of worship and the government of the church in Scotland.

Probably it was found that the regulations as to church government, which were sufficient for Scotland, where Presbyterianism had previously been known, were not adapted to England, where it was all new; and accordingly we find that the document thus adopted in Scotland, as to the form of church government, was not introduced in this country. But on the 26th of August, 1648, an ordinance was passed by the lords and commons, entitled "The Form of Church Government to be used in the Churches of England and Ireland." By its terms provision was made for electing elders in every parish or congregation, and for dividing the whole kingdom into presbyteries, and for the general church government of the whole kingdom by assemblies, congregational,

classical, provincial, and national, as in Scotland; and also for directing the steps to be followed in the ordination of ministers; on which latter head also * there is an entire substantial conformity with the course directed in the form of church government, which, as I have already stated, had been adopted by the Scotch General Assembly. The effect of these enactments, and of several others of minor importance, was to establish one uniform system of Presbyterian Church government in the two kingdoms.

In this state matters stood at the Restoration, at which time, or soon afterwards, all which had thus been done by the ordinances of the lords and commons in England, and by the Parliament and General Assembly of Scotland, was swept away and Episcopacy was re-established in both kingdoms. In England, by the Act of Uniformity, 13 and 14 Car. 2, c. 4, all ministers were required, before St. Bartholomew's day, 1662, to assent and conform to the Book of Common Prayer, as then amended, under pain of forfeiting any benefice they might hold. The consequence of this, as might naturally have been anticipated, was, that a large body of the clergy were ejected from their livings, which they had accepted while Presbyterianism was in the ascendant, and they, with such of their flock as entered into their views of church government and discipline and doctrine, formed a body of non-conformist Presbyterian dissenters scattered throughout the country, against whom very harsh laws were, from time to time, enacted, though apparently without the result of effectually putting them down.

This state of things continued till the Revolution of 1688, when entire practical toleration was conceded to all orthodox Protestant dissenters in England, and in 1690 Presbyterianism, as it had existed before the Restoration, was re-established in Scotland.

* 132 Of course the * dissenting congregations, which had continued to exist in England under all the difficulties imposed by the laws of Charles II., assumed fresh vigour under the new state of things which was consequent on the passing of the Toleration Act. They existed from that time openly and without disguise, under the protection of the law. One of those congregations was the congregation at Berwick, afterwards known as that of Master John Turner, during whose ministry, and for the benefit of whose flock, the Low meeting-house was founded in 1719. I have already stated my reasons for thinking that this

must have been a congregation of Presbyterian dissenters, *i. e.*, a congregation holding what are called the Westminster standards of faith as laid down by the assembly of divines, whose public worship was conducted according to the directory for public worship adopted in England by the ordinances of January, 1644, old style, and who approved the Presbyterian form of church government introduced into Scotland by the Act of Assembly of 10th February, 1645, old style, and enacted in England by the ordinance of the 26th of August, 1648. The history of the congregation, as stated by the relators and plaintiffs, and which on the evidence may fairly be assumed to be correct, is this. The information charges in substance that Luke Ogle was the minister of Berwick before the Restoration and while Presbyterianism prevailed in England. That he was ejected from that benefice in 1662 by the operation of the Act of Uniformity. That in the year 1685, at a time when, in spite of the then existing law against nonconformists the government was inclined to deal leniently with them, he established the congregation in question at Berwick, and continued to act as its minister up to his death in 1696. That he was succeeded by William Foster, the immediate predecessor of Turner. That Foster died in 1713, at or about which * time, * 133 therefore, Turner must have become minister of the congregation by and for whom the chapel was erected six years afterwards.

This being the state of the congregation when the meeting-house was built, the question is, whether it was part of the original intention of the founders that the minister should always be a licentiate of the church of Scotland. In resolving this problem, the first question which presents itself is this: Why should they have had any such intention? Why should this English congregation have intended voluntarily to prevent those who should come after them, and even themselves, from selecting as their pastor a minister, however competent and however pious, and who had been regularly ordained by an English presbytery, merely because he was not a licentiate of the Scotch Church? Looking at the matter merely in the abstract I can see no motive for such an intention. That ministers continued to be ordained in England by English presbyteries is plain from the entry in the books of the presbytery of Dunse, on occasion of the admission of Laurie as minister of Hutton, of the date of the 19th of December, 1693. It is there stated that the said

Mr. Laurie had produced an ample testimonial of his ordination at London *anno* 1686, and of his good behaviour, and subscribed by several London ministers of good note. If, even under the pressure of the severe laws against non-conformists as they stood in 1686 (though probably not at that particular epoch likely to be enforced), such ordinations took place in England, there can surely be no difficulty in supposing that the same practice continued in 1719, when the Act of Toleration had been in force for thirty years. Presbyterianism had once been established and once abolished in both countries. It

had since been restored in Scotland, and tolerated but not

* 134 restored in England. Very likely this Berwick * congregation, looking to their close proximity to Scotland and to the fact that Presbyterianism had there become the national religion, and so that a supply of ministers would be more readily obtained from thence than from England, might contemplate the great probability that their ministers would often be drawn from Scotland. But that does not afford any reason why they should wish voluntarily to tie up their own hands and the hands of those who should come after them by making a Scotch license and ordination indispensable, even if a minister perfectly satisfactory in all respects might be obtained from their own country.

The circumstance that the English Presbyterians continued to adhere to their old faith, though not participating in the secular benefits of an establishment, would be likely to induce the belief that they would be more zealous and orthodox than their Scotch brethren, not that they would be less so. There either then was, or thereafter might be, an English presbytery which should include Berwick in its bounds; and if so, that presbytery would be the only perfectly regular authority for ordaining a minister to the Low meeting-house. For according to the form of church government prevailing both in England and Scotland under the several Acts and ordinances to which I have referred, it is clearly laid down, that the presbytery in which each congregation is situated, is the proper body to ordain the minister to that congregation, though, no doubt, where there is a necessity, power is given to any other presbytery to ordain. So that, if and so soon as Berwick should be included in any English presbytery, the only regular body to ordain their minister would be that presbytery; and in such a state of things, even though no such presbytery might exist in 1719, when the Low meeting-house was built,

it seems to me very improbable, reasoning ** à priori*, and * 135 without reference to the circumstances of the particular congregation, that the founders could have intended that, under all circumstances, a Scotch license and ordination should be essential; that if a minister, pious, orthodox, and agreeable to the congregation, should offer himself, they should be bound to reject him, if he had been licensed by an English presbytery,—by that of London, for instance, and not in Scotland,—and that they should be bound, if a class should ever exist including Berwick in its bounds, to seek ordination, not from the body indicated by the form of church government as being the most proper authority, but from another source.

I am therefore of opinion that, looking at the question merely in the abstract, and without reference to the circumstances of this particular congregation, it was very unlikely that a congregation of Presbyterian dissenters in England, founding a meeting-house in 1719, when possibly there were some who might recollect the Presbyterian form of worship as having been the established religion of their own country, and when the traditions as to the ascendancy of that mode of worship in this country must have been strong in the minds of all, should intend to make it an essential point that their minister should, under all circumstances, be a minister ordained by the Church of Scotland. And if this be a reasonable conclusion, looking at the question merely in the abstract, I think it derives great additional weight, when we look to the particular circumstances under which the congregation of Master John Turner existed. They had been originally founded by Luke Ogle, who had certainly been ordained in England, for he had held what we should call the living or benefice of Berwick previously to the Restoration, and was ejected in 1662 * on the re-establish- * 136 ment of Episcopacy, and the re-introduction of the Book of Common Prayer. Surely when he, as stated in the information, came to Berwick, and formed this Presbyterian congregation in 1685, consisting, as it no doubt did, of many of those, and the families of many of those, over whom he had, twenty-three years previously, presided as their regularly English ordained minister, he must have been welcomed by his flock, not from any connection between him and the Scotch Church, if indeed any such connection ever existed, but by reason of his having formerly been their English Presbyterian pastor. Indeed, at that time (1685), as was pointed

out in the argument, Episcopacy prevailed in Scotland as well as in England, so that there was then no more reason to look for orthodox ministers on one side of the border than the other. It seems that during some part of Luke Ogle's ministry, he had, as a colleague or assistant, Gilbert Laurie, who in 1693 was then ordained to a Scotch church, but he had, as I have already remarked, been previously ordained in London, and I see nothing to satisfy me, that, while he was Luke Ogle's colleague, he was any thing but an English ordained minister. The congregation thus appears, in its origin, to have been English, and not Scotch, with reference to its Presbyterianism ; and this must probably have so continued, at all events to the death of Luke Ogle in 1696 ; and it is a very improbable thing, that between that date and the foundation of the chapel in 1719, the views and feelings of the congregation should have been so completely altered, as that the same ordination which had no doubt recommended Luke Ogle to them, should never thenceforth be admitted as sufficient. I think, therefore, that the history of this congregation makes it particularly unlikely that the founders of the chapel could ever have contemplated

* 137 what this *decree declares to be essential ; namely, that the minister of the chapel must be a licentiate and minister of the Church of Scotland.

Is there then any thing in the subsequent history of the foundation, which ought reasonably to lead to the inference which is the foundation of this declaration in the decree ? The circumstance relied on is one always entitled to great weight, namely, long-continued usage, *i.e.*, the fact that all the ministers since 1719 have been Scotch licentiates and ministers. I have already stated that in my opinion it is made out that, since the year 1780, or thereabouts, all the ministers of the meeting-house have been either Scotch licentiates or ministers ordained by a Scotch presbytery, and I shall assume for the present that this has been so for the whole period. But what then ? The question still arises, to which I have already adverted, how and why has it happened that this uniform selection of Scotch licentiates and ministers has prevailed ?

Is this a matter in which we can reasonably infer from the usage, that what has been so uniformly done, was part of the trust, as we certainly may reasonably infer that the celebration of divine service according to the Presbyterian model was part of such trusts ?

Where a course of practice has long prevailed on any particular subject, the inference that it has been a just and legal course, is consistent with law and reason, and therefore, if any one were now to attempt to call in question the right of a Scotch ordained minister to be minister of the Low meeting-house, on the ground that the original foundation was for English ordained ministers only, the fact that Scotch ministers had always * been * 138 appointed would be most important, probably conclusive on the subject. The extreme improbability that for above a century such a practice, if illegal or contrary to the trust, should have been allowed to exist, would wellnigh countervail any evidence which could be brought to show that it was contrary to the original intention of the founders.¹ But that is not here the point in dispute; no one questions the right of a Scotch ordained minister to become the minister of this chapel, if he be duly chosen. The question is not whether he may, but whether he must, be a Scotch licentiate or minister; and on this latter question the usage, though certainly not to be disregarded, as affording no evidence on the point, is yet to be compared with the other circumstances, and to be weighed against them. The usage may have prevailed, because it was the only usage consistent with the trust; it may have prevailed because it was the most convenient usage. And I think the latter is the more reasonable inference from the facts of the case. For I assume first that there was an improbability, *à priori*, that any body of English Presbyterian dissenters building in 1719 a meeting-house for Presbyterian worship, for their own convenience and edification, should intend to bind themselves, and all those who came after them, never to admit, as their minister, any one not licensed or ordained by a Scotch presbytery; and secondly, that this improbability was increased in the case of Master John Turner's congregation by reason of its having evidently originated and existed for ten or eleven years, under a minister whose title to its favour and respect must have been his original English ordination, and not any connection with Scotland. This being so, is it so very improbable that the uniform selection of Scotch ordained ministers should have resulted from any thing short of absolute binding necessity arising * from the * 139 nature of the trust, as to outweigh the *à priori* improba-

¹ See *Lewin Trusts* (5th Eng. ed.), 401.

bility that the founders intended to impose on their successors such a necessity? I think not. Though, as appears from the evidence in the cause, there has never been a cessation in England of the practice of ordaining ministers according to the Presbyterian form of ordination, yet the number of ministers so ordained has not, I believe, been very large. The progress of dissent in this country has gradually tended rather away from Presbyterianism, and towards Independency. So that those who for the last half-century and upwards wanted to obtain a regular orthodox Presbyterian minister, to take charge of a true Presbyterian congregation, might not always have found it easy to get such a pastor from those ordained in England. Nothing, therefore, could be more natural than that a congregation so circumstanced should look to Scotland, where they were always likely to find a full supply of ministers. This would to some extent be true to whatever part of the kingdom the congregation might belong; but the observation applies with greatly increased force to a congregation in Berwick, a town originally Scotch, bordering closely on Scotland, and where the intercourse with Scotland must be as constant and uniform as with England. That a congregation there situate should look to Scotland for its ministers, was so natural that the mere fact of its having always done so has very little weight with me as tending to show that in so doing it was acting in obedience to a positive trust, which left no discretion on the subject.

In making these observations I have assumed that all the ministers have been licensed or ordained by the Church of Scotland; but, as I originally intimated, as to the earlier ministers, I am not at all satisfied that such was the case.

* 140 [* After commenting upon the evidence as to this point his Lordship said:—]

I am therefore of opinion that neither as to Turner, nor those who preceded him, nor as to Gardner, is there any evidence satisfactorily showing that they were Scotch licentiates or ministers. The point is not perhaps very material as to those who preceded Turner, but as to him it is most important, for if he was not a licentiate and recognized minister of the Church of Scotland, it is very difficult indeed to suppose that those who built the chapel during his ministry and for him could have intended to impose such a qualification on all future ministers.

It may, however, be said that as there is not any proof that Turner was not a Scotch licentiate and minister, it may fairly be assumed that he was so by reasoning backwards from more modern times, that for more than half a century all the ministers have been Scotch licentiates, therefore in the absence of proof to the contrary it is fair to infer that all have been so ever since the foundation. This may, in some cases, be a legitimate mode of reasoning; but it is entitled to little weight when the more modern usage can be explained on grounds inapplicable to the earlier period. Now, here I have already stated that in my opinion the near neighbourhood of Berwick to Scotland, and the constant friendly intercourse between them, together with the probable difficulties which the congregation of the Low meeting-house might experience in obtaining proper ministers from England, may well explain the reason why in fact they have always been obtained, for a long time back, from Scotland. But the matter does not rest on any general reasoning of this kind. There are circumstances in evidence which seem to me strongly to illustrate the * view which I take of this part of the case, and to * 141 show that the choice of Scotch ministers for the last half-century has arisen from other causes than the positive obligation of the trust. I allude to what took place on occasion of the removal of Mr. Aitcheson in 1797, and to the resolutions of the elders and trustees of the meeting-house in 1809, and afterwards. Mr. Aitcheson was, as I have already stated, certainly a licentiate of the Scotch Church. By what body he was ordained to the ministry of the Low meeting-house does not appear by any direct proof, but the great probability is that he was ordained by the Northumberland class; i.e., by an English and not by a Scotch presbytery.

[After stating the parts of the evidence which his Lordship considered as supporting this conclusion, he proceeded: —]

Probably in 1809, and at the subsequent elections, those who took an interest in the affairs of this congregation, had discovered that the only effectual mode of securing to themselves the benefits of strict orthodox Presbyterian worship, was to put themselves (so to say) under the Church of Scotland. This they did by express resolutions on three several occasions. But the question is not,

what would now be the best means of securing a succession of strict Presbyterian ministers, but what were the conditions and restrictions contemplated by the founders. Perhaps, if they could in 1719 have foreseen what would happen a hundred or a hundred and twenty years later, they might have framed a trust conformable to the declaration in this decree. Perhaps they might not. But this is mere matter of speculation, in which we have no right to indulge. The question is, not what declaration

* 142 of trust might have * been expedient, but what trusts can be inferred as having actually been in the contemplation of the founders. I do not think that any such restriction confining the ministers of the Low meeting-house to licentiates of the Church of Scotland, as is required by this decree, can be so inferred.

In the foregoing observations I have proceeded on the principle, that, unless the restriction contended for was in the contemplation of the original founders, it could not have been, or at all events, in the present case, was not created subsequently. But I am aware it was argued at the bar, that even if it was not part of the original trust to require that the minister should be a licentiate and recognized minister of the Church of Scotland, still such a qualification might at some subsequent time, by resolution of the congregation, have been made essential, so as to bind succeeding congregations. And here, it was said, the facts of the case show, that, if such a qualification was not among those required by the original terms of the foundation, then it must have been in some such mode subsequently established.

On this head of argument it is sufficient to say, that the circumstances to which I have already fully adverted relating to the appointment of the several successive ministers, appear to me to negative the proposition that any such resolution ever was come to. I do not think that any minister, previously to 1797, is shown to have been an ordained minister of the Scotch Church at all. The reasons which led to the ordination of Mr. Smith, in 1797, by a Scotch and not by an English presbytery, were of a local and temporary character. There could not, as I think, have then

* 143 been any general resolution * intended to bind all future elections. Certainly no such resolution was passed in or since the year 1809 ; for from that date the minutes of all the proceedings of the Low meeting-house are in existence, and no such resolution is found upon them. The resolutions passed in 1809,

and at the two succeeding elections, seem to me inconsistent with the existence of any previous general resolution, requiring, in all cases, a Scotch licentiate and ordination. For, if such general resolution existed, what could have been the use of the resolutions passed previously to the elections in 1809, 1821, and 1823, specially requiring those qualifications on those particular occasions? The facts do not, as I think, exist on which this branch of the relator's argument must rest, and therefore the question does not arise whether any such resolution could, consistently with the doctrines of this Court, bind future congregations so as to warrant this declaration in the decree under which no one can be a minister who is not a licentiate and recognized minister of the Scotch Church.

For the reasons, therefore, which I have endeavoured to explain in detail, I am of opinion that the decree, so far as it declares that no person is qualified to be a minister or pastor of the Low meeting-house without being a licentiate and recognized minister of the Established Church of Scotland, and in full connection therewith, is erroneous, not being warranted by the evidence. I think it is sufficient that he is a Presbyterian minister, regularly ordained to the congregation according to the Presbyterian mode of ordination as practised in England, Scotland, and Ireland.

I think it right here to advert to the recent Statute of 7 & 8 Vict. c. 45, because an argument was attempted *to *144 be built on it. But I think it wholly inapplicable to the present case. As at present advised, I incline to think it does not apply to a case where the question is whether a minister has or has not been duly ordained according to the original trust; but, even if such a question would be within the power of the enactment, still the statute can have no operation here. The effect of it in this particular case can only be to make Scotch ordination valid and sufficient, and of the validity of such ordination there can be no doubt. The statute leaves untouched the question whether such ordination is or is not essential.

I have thus gone fully into this part of the decree, because I think it is calculated unduly to fetter the choice of the congregation in their appointment of ministers. But it now becomes my duty to state (and that I shall do very shortly) that, so far as the case of the defendant Murdoch is concerned, I am clearly of opinion that the decree is right in declaring that he had ceased to be qualified to exercise the office of minister of the Low meeting-house,

and so in giving the necessary directions for preventing him from using, and the trustees from permitting him to use, the chapel. The grounds on which I come to this conclusion are very short and simple. Mr. Murdoch's ordination was in fact a Scotch ordination. He was ordained by the presbytery of Kelso. That ordination was certainly sufficient to qualify him to hold the office of minister of the Low meeting-house. But it was necessary not only that he should be in the first instance duly ordained to the chapel, but, further, that such ordination should remain in force so long as he should continue in the post of minister. It is an essential part of the Presbyterian system that none but a regularly ordained

* 145 minister or licentiate should preach or perform * divine service. This is the rule laid down in the Acts regulating Presbyterian Church government both in England and in Scotland. Now it appears to me perfectly clear on the evidence, that Mr. Murdoch has absolutely ceased to be an ordained minister of the Church of Scotland. In fact, by his answer he repudiates all connection with that Church. Even if he had not done so, I am satisfied as a matter of fact on the evidence that Mr. Murdoch, being a member of the synod held at Berwick on the 16th of April, 1844, did adhere to the resolutions then and there adopted; and, that being so, he was brought within the express terms of the Act of General Assembly of 2d June, 1845, entitled "An Act anent Presbyterian Churches in England," which enacts and declares that all members of the synod who so adhered are no longer members of or in communion with the Established Church of Scotland. The effect of that enactment was not directly to remove Mr. Murdoch from his situation as minister of the Low meeting-house. Neither the General Assembly nor any Scotch Court could affect his civil rights in this country. But it certainly was within the competence of the General Assembly to deprive him of his *status* as an ordained minister of the Scotch Church, and that has been effectually done. He is no longer an ordained minister of that Church, and if not of that Church, then of no other Presbyterian Church whatever, and therefore not now capable of being minister or pastor of the Low meeting-house. On this part of the case I have nothing further to add.

The result of my judgment being that the decree is wrong in declaring that the minister of the Low meeting-house must be a licentiate and recognized minister of the Established Church of

Scotland, and in full connection therewith, it necessarily follows that in my judgment the directions consequent on that declaration are also * wrong. Had my learned brother taken * 146 the same view as I do on this part of the case, it would have been our duty to point out in what respects those directions must be varied, but as he concurs with Sir JAMES WIGRAM no such alterations will be requisite. The decree will stand in its present form; and I feel that I shall have done all which my duty requires of me in pointing out generally the grounds of the opinion I have formed, without indicating the precise modifications of the decree, which, if the same grounds had been taken by my learned brother, would have been necessary.

The decree will of course be affirmed, and the appeal dismissed.

* In the Matter of The ST. GEORGE STEAM-PACKET * 147
COMPANY, and of The JOINT-STOCK COMPANIES
WINDING-UP ACTS, 1848 and 1849.

Ex parte CROPPER.

1851. December 1, 8. Before the Lord Chancellor Lord TRURO.

Previously to the passing of the Winding-up Act, 1848, a joint-stock company was dissolved under provisions contained for that purpose in the deed of settlement of the company, and a committee was appointed for winding up its affairs. Finding it impossible to do this in the then existing state of the law, the committee incurred a considerable bill of costs in attempting, through their solicitor, to get the public Acts of Parliament, which at that time were being brought forward, made applicable to the case of the company, and finally in urging forward the passing of the Winding-up Act itself. On the passing of that Act an order was obtained for winding up the company: the committee then claimed to be paid out of the assets of the company the amount of their solicitor's bill of costs, but this claim was disallowed, on the ground that the matters in respect of which the costs were incurred were beyond the power of the committee.¹

THIS was a motion on behalf of Edward Cropper, Ebenezer Pike, Jonathan Pim, George Braithwaite Crewdson, and John

¹ See The Worcester Corn Exchange Company's Case, 3 De G., M. & G. 180; Gillan v. Morrison, 1 De G. & S. 421; 1 Lindley Partn. (Eng. ed. 1860) 626-633. Compare The Norwich Yarn Company's Case, 22 Beav. 149; The German Mining Company's Case, 4 De G., M. & G. 19.

Potter, being certain of the contributories of the St. George Steam-Packet Company, that an order of the Vice-Chancellor KNIGHT BRUCE, dated the 12th December, 1850, might be reversed or varied, and that the bill of costs of Messrs. Laces, Myers, & Rigge might be taxed as between attorney and client, and the amount paid to the parties moving by the official manager out of the assets of the company.

The deed of settlement of the company contained provisions for the dissolution of the company by the shareholders. On the 14th September, 1843, the company was dissolved under these provisions, and the parties now moving were appointed a committee for carrying the dissolution into effect. It was, however, * 148 found impossible to accomplish this, and the * company was ultimately brought under the provisions of the Winding-up Act, 1848. The bill of costs in question was for the professional services of the solicitors employed by the committee, who claimed to charge it on the assets of the company. The Master, by whom the company was being wound up (under an order dated the 10th November, 1848), rejected the claim, and his decision was affirmed by the Vice-Chancellor, from whose order the present appeal was brought. The following are the clauses of the deed of settlement of the company under which its dissolution in 1843 took place.

Clause 72. "That an absolute and entire dissolution of the company and determination of this partnership may lawfully take place on the terms hereinafter expressed, and on no other terms; that is to say, by and with the consent and approbation of two-third parts at least in number and in value of the votes of the shareholders present in person and voting at each of two successive meetings of the proprietors, and each meeting to be, for that purpose exclusively, respectively convened by the directors, by one calendar month's notice at least (to be signed by the clerk for the time being), by advertisement in a Liverpool and Dublin newspaper; and that proper measures for effectuating such dissolution shall be taken by a committee, to be composed of three of the directors for the time being of the company, and by an equal number of persons to be elected by the majority of votes of the shareholders present and voting at the latter of such meetings; and that after such dissolution the affairs and concerns of the company shall, with all convenient speed, be wound up, and the

debts and liabilities of and claims on the company shall be satisfied, discharged, or otherwise sufficiently provided * for; * 149 and all the vessels, boats, engines, and other property and effects, securities or assets, guaranties, and other funds, and interest and benefit of existing engagements, shall be converted; and for that purpose all outstanding debts owing to, and the benefit of engagements belonging to, the company, may be sold for money, and the balance, if any, of the assets and property of the company shall be divided among the persons who shall be the respective shareholders at the period of dissolution, and their respective executors and administrators ratably and in proportion to the amount of their respective shares at that time, and any of the shareholders, not being a director, may become purchasers of any of the assets of the company which shall be sold; and the majority of votes, according to the rules of voting hereinbefore contained, present and voting at any such special meeting to be convened for the purpose, may declare the accounts of the company finally closed, and the assets of the company fully administered, or with such exceptions as they may think fit to declare; and the directors, trustees, and all other parties to be released and discharged, with or without such exceptions, from all suits, claims, and demands under and by virtue or in consequence of these presents, and they shall be released and discharged according to such resolution, and in the form and under the modifications thereof."

Clause 76. "That the directors for the time being may apply for and solicit, out of the funds of the company, a charter for the purpose of incorporating the company hereby established or the shareholders thereof for the time being, and also may apply for and solicit an Act of Parliament for the purpose of giving full effect to and carrying into execution the provisions, agreements, and stipulations in these presents or in any supplemental * deed contained, and procuring such other privileges as * 150 may be requisite or necessary for the purpose, or as may be deemed advantageous for the interest of the said company."

The following statement, showing the several matters in respect of which the bill of costs in question was incurred, is in substance taken from the affirmation made in the case by Mr. Rigge (a Quaker), one of the firm of the solicitors employed by the committee: The company was dissolved, as before stated, on the

14th September, 1843, under the powers contained for that purpose in the seventy-second clause of the deed of settlement, by the votes of the shareholders present in person and voting at two successive meetings of the proprietors duly convened according to the requirements of such clause, the first of such meetings being held on the 1st August, 1843, and the second on the 14th September, 1843; and at such last-mentioned meeting Abraham Wood, Ebenezer Pike, and Jonathan Pim, being three of the directors, and Edward Cropper, George Braithwaite Crewdson, and John Potter, three of the shareholders of the company, were appointed a committee for effectuating the dissolution and winding up the affairs and concerns of the company; and the committee, immediately after its appointment, employed Messrs. Laces & Co. to act as their solicitors.

Previous to the dissolution, the directors had issued circulars to the several shareholders, requesting a contribution of fifty pounds per share towards paying off the liabilities of the company; and at the dissolution about 70,000*l.* had been received on account of such contribution. At that time the company were indebted to various persons in about 162,000*l.*, and * had assets estimated to produce 91,000*l.*, leaving an estimated deficiency of about 71,000*l.* The company then consisted of about three hundred and fifty shareholders; and the committee, after a careful examination of the accounts, and consideration of the means of the different shareholders, were of opinion that it would require the sum of fifty pounds per share from those who were able to pay but had not already paid the contribution of fifty pounds per share, and the further sum of sixty pounds per share from all those shareholders who were able to pay the same, to enable them to discharge the debts and liabilities of the company. The committee caused a full statement of the accounts to be printed and circulated amongst the shareholders, accompanied by a report signed by the secretary, setting forth their opinion as to the state of the company, and requiring the immediate payment of those sums of money. The sum of one hundred pounds per share, being the total amount authorized to be raised by the deed of settlement from each shareholder, having been fully paid by the shareholders, the committee had no power under the deed, by action or otherwise, to enforce payment of the sums required for the purposes aforesaid. Previously to the dissolution of the company, Mr. J.

O. Binger, at the request of the directors, visited Ireland for the purpose of waiting on the various shareholders who had not paid the fifty pounds contribution, and pressing upon them the absolute necessity for such payment; and during such visit he personally called on the greater number of the shareholders living there, but the amount which he was enabled to induce them to pay was small. After the dissolution, Mr. James Powell, the secretary appointed by the committee, went over to Ireland for the same object, and during his visit there he saw the greater number of the shareholders who were in arrear, and urged upon them the necessity of making * the payments, but he was only * 152 enabled to induce them to pay a very small amount.

The committee having no direct means of obtaining payment of these sums, Mr. Rigge, with their sanction, induced several creditors to issue writs of *scire facias* on judgments obtained against the company against several shareholders who had not paid. The holders of such judgments refused, however, to issue the writs and take proceedings against the shareholders, unless they were indemnified from costs: such indemnity was accordingly given and several actions were brought and tried, but it was found that the expense of proceeding in this manner would preclude any beneficial result arising to the company; and on this, and also on the ground of the committee having been advised that such proceedings were illegal, the proceedings to enforce payment by writs of *scire facias* were abandoned. The committee was then advised that the only mode left, for the winding up of the affairs of the company and enforcing an equitable payment towards the losses of the company by the different shareholders, was by bill, but that, from the great number of shareholders residing in different parts of England and Ireland and the intricacy of the accounts, the attempt to wind up the affairs of the company in this manner would, after incurring very large expense, be in effect useless.

In 1844, a bill was introduced into Parliament by government for winding up joint-stock companies unable to meet their pecuniary engagements (the Act 7 & 8 Vict. c. 111); but, as it only applied to companies then carrying on business and not to such as had been dissolved, the remedies proposed for winding up were altogether inapplicable to a company in the position of the St. George Steam-Packet Company: the bill only professed to deal with a

company's existing assets and contained no provisions

* 153 * whatever for enforcing payment from the shareholders in cases where the assets should prove insufficient for discharging the debts and losses of a company. Under these circumstances Mr. Rigge, by the direction and with the knowledge of the committee, went up to London at various times during the session, for the purpose of procuring such alterations in the bill as would render it applicable to the St. George Steam-Packet Company, and enable the affairs of the company to be wound up by the committee. After various interviews with the Board of Trade, who had charge of the bill, and through the influence of different members of Parliament whom Mr. Rigge and his agent, Mr. Field, interested in the matter, certain clauses were introduced into the bill, extending its provisions to companies which had been dissolved previous to its passing, providing for enforcing the ratable payment by shareholders towards the losses of the companies where the assets should prove insufficient for the discharge of their liabilities, and for rendering shareholders resident in Ireland and Scotland subject to the provisions of the bill. At a meeting of the committee held upon Mr. Rigge's return from London, he reported to the members of the committee then present the various steps he had taken for carrying out the purposes aforesaid, when such steps were fully approved of by the committee, and Mr. Rigge was then instructed to use his best exertions to procure the making of the orders in chancery requisite for carrying out the provisions of the Act. (a) Mr. Rigge accordingly, several times during the year 1845, visited London for the purpose of having interviews with Lord LANGDALE, the Board of Trade, and other parties, and endeavouring to procure the making of the requisite orders; he was at length informed by the Board of Trade, that, after an interview with the Lord Chancellor, they did not think that such orders were then at

* 154 * present required. Mr. Rigge and Mr. Field had however, for the purpose of carrying out the provisions of the Act, prepared the heads of such orders as appeared to them requisite for the purpose, and the Board of Trade, after many interviews, agreed to bring in a bill for carrying out the intention of the former Act through the medium of the Court of Chancery.

In 1845, the government introduced a bill (the Act 8 & 9 Vict.

(a) See 7 & 8 Vict. c. 111, § 22.

c. 98) for extending to Ireland the provisions of the Act of 1844 ; and as Mr. Rigge had been advised by counsel that considerable doubt existed as to whether the St. George Steam-Packet Company could be wound up under the Act of 1844, inasmuch as the company was established in Ireland and was otherwise treated as an Irish company, by the deed of settlement having been registered in the Court of Chancery there and all the vessels of the company having been registered at the custom-house in Dublin, Mr. Rigge applied for, and after considerable difficulty obtained, the insertion of a clause (section 29), for the purpose of enabling the company to be wound up in England.

During the sessions of the years 1846 and 1847, Mr. Rigge visited London many times for the purpose of pressing forward the preparation of the bill promised by the government, as above mentioned, and having interviews with Mr. Bellenden Ker, who was the counsel consulted by the Board of Trade in the matter, on the details thereof ; and though the government from time to time promised in the House of Commons that the measure should be introduced, yet, from the repeated delays that took place, it was not introduced until the latter end of the session of 1847 ; and was not finally passed until 1848. Under this Act, " The Joint-stock Companies Winding-up Act, 1848," an order was obtained for * winding up the St. George Steam-Packet Company as * 155 above stated.

Mr. Rigge from time to time, at the meetings of the committee, reported fully to them the various steps which were taken to obtain the passing of the measure ; these steps were adopted and approved, and Mr. Rigge from time to time, during the intervals between the meetings of the committee, corresponded with all the different members of the committee except Mr. Ebenezer Pike, and informed them of his proceedings, and from time to time received from all of them, except Ebenezer Pike, most urgent requests to press on the measure. Mr. Rigge stated in his affirmation, that he was satisfied that the Winding-up Act would not have been prepared and passed without his constant and personal attendance in London. The bill of costs incurred by the committee in these various proceedings, and which was now in question, amounted to 2197l.

Mr. Rolt and *Mr. Selwyn*, for the appeal motion, contended that

all the acts done, and for which the costs had been incurred, were legitimately within the powers of the committee; that under the terms of the deed of settlement they might have applied for a private Act of Parliament, and that it made no difference that they had attained the same result by getting the requisite provisions inserted in a public Act.

Mr. Bacon and *Mr. J. V. Prior*, contra, submitted that the powers of obtaining an Act of Parliament which were contained in the deed of settlement had no reference to the circumstances of the present case; that the object of the proceedings of the committee now under discussion, was not to carry out the purposes of the company, but, the company having been dissolved, to enable * 156 certain * shareholders, whom the creditors of the company had fixed with liabilities, to obtain contribution from the rest of the members.

Mr. Selwyn in reply.

THE LORD CHANCELLOR. — I own myself unable to entertain any doubt on this case, which appears to me to be unaccompanied with any serious difficulty. Certain individuals formed themselves into a company, and became partners under a deed creating certain liabilities in these parties *inter se*; their liabilities with regard to the public depended of course on the general law, which could not be altered or affected by any private agreement between the partners. It then appears that the company found itself in a condition in which it became necessary to wind up its concerns; and I am told that those who interfered for this purpose did so, not by resorting to any of the provisions of the deed, or to any general law applicable to the winding up of a partnership, but that they resorted to some proceedings of inducing creditors to bring actions or to issue writs of *scire facias* against different individuals, not with a view of charging those individuals with any contributions or proportions as partners, but with a view of charging them with the debts of individual creditors. Whether this was or was not a correct course does not come before the Court, but the individuals who resorted to it found that it was not calculated to lead to the desired result, and they therefore agreed to dissolve the company, according to the terms of the deed.

Now when the partners engaged with each other under that deed, they might or might not know precisely what were the legal obligations to which the *terms of the deed as *157 between each other subjected them; but this is clear, that they meant to be bound by the existing law in regulating their liabilities as regards each other, and not by some future and unknown law. Neither does it appear that at the meeting at which it was resolved that the company should be dissolved and its affairs wound up, any suggestion was made of applying for any new law which should regulate the liabilities or remedies between the parties themselves differently from what was done by the contract of partnership into which the parties had entered. The committee was appointed apparently with reference to no other view, and in contemplation of no other proceedings than such as were consistent with the deed. These might or might not be competent for the purpose proposed; but, at all events, each of the proprietors would have a right to a voice whether he would consent to the funds of the company, or the funds to be subscribed by individuals, himself being one, being applied to the obtaining of a new law which should increase liabilities and give remedies which had not previously existed. It appears to me, that those who concurred in appointing the committee could have had no ground whatever to suppose that at their expense the committee was to wind up the company by obtaining some new law, still less that at their expense an application should be made to improve the general law of the country as applicable to such concerns, in the benefits or prejudices of which they would partake. In respect of certain members of the company, the effect of the new law was to increase their liabilities, and to give facilities for enforcing them: this would be no improvement in their condition, though it might be in the condition of others and in the general law; and individuals thus circumstanced, having authorized a committee to wind up a concern as between themselves and their partners in a *given *158 state of the law, might well express their surprise that they should be charged with the obtaining of a new law for such a purpose.

The general body of the subscribers must then have supposed that that was in contemplation which I have just stated; but it would appear that certain members of the company, having found that the existing law could not be conveniently applied to the wind-

ing up of the company, had a latent intention of endeavouring to obtain some new law which should improve the condition of some persons connected with the company who might be under a primary liability to the creditors. The bill of costs, accordingly, opens not with any attempt to wind up the concern under the existing law, but with the consideration of a bill brought into Parliament by the government, and with the endeavour to get some clauses introduced into it for the purpose of making it embrace the circumstances of this company. Of course, while doing this, it would also embrace all other companies whose circumstances were the same. The committee, however, started with the intention of obtaining a new law, and as far as I have been able to go through the items, the whole of the bill of costs appears to be directed to that object.

But it is said that the solicitors have a right to be paid: that will be so, if the solicitors have exercised due caution in letting the committee know what they were about, and that they were incurring this large bill of costs on their individual responsibility, and that it was not within the scope of the authority that the company had given them. If, however, the committee have trusted the solicitors to keep them within the limit of their authority and to enable them to act safely and prudently, and if, in this * 159 case, the solicitors, by mistake or oversight, * have led them into error, that will be a matter between them and the committee, but has no connection with the question of the general liabilities of the company. Dealing, therefore, with that part of the bill of costs which has relation to the subject which I have mentioned, my opinion is, that the decision of the Court below and of the Master was correct, and that it was not within the authority of the committee to set about procuring either a general or a particular Act of Parliament.

It is also urged that the committee were to take the proper measures for winding up the company, but this must be understood to have reference to the deed of partnership by which the parties had bound themselves to each other, and under which the committee was appointed. It seems to me that as far as the general appointment of the committee was concerned, they were bound to resort to such means as the deed authorized and no other; and they were not appointed with any express or implied authority to incur expenses not within the terms of that deed, and the author-

ity which by that deed was proposed to be given to any body, directors or committee or whoever it might be, who should be charged with the duty of winding up the concerns of the company.

Then it is argued that there is authority in the seventy-sixth clause of the deed to apply for an Act of Parliament; but it is quite impossible to read that clause without perceiving that it has no reference to the winding up of the company, but is directed to a totally different object, and is for the purpose of giving effect to and carrying into execution the provisions of the deed. The clause begins by giving authority to obtain a charter, which could not be for the purpose of winding up the company; and the latter part of the clause has the same general object. Either a charter is to be obtained or an Act of Parliament, * but * 160 whether one or the other, the object and sole purpose to which the clause is directed is that of the prosecution of the company. There is also an express clause, the seventy-second, directed to winding up the affairs of the company, which is entirely silent as to any authority to procure an Act of Parliament, or any thing going beyond the express provisions of the deed; and comparing this with the language of the seventy-sixth clause, the distinction between the two appears to me perfectly clear and apparent.

But then it is said that, admitting the committee were only authorized at the expense of the company to prosecute such remedies as were incident to the partnership founded on the deed, there were other applications made for the purpose of procuring certain orders. I do not, however, find that any of these applications were for the purpose of obtaining rules and orders independent of or with any other object than to incorporate them in the Act of Parliament. Indeed, from the commencement of the bill of costs, it is apparent that all idea of winding up the concern under the existing law was abandoned, and that it was a new law that was desired. Now if that new law can have any application to the subject, it must be as directed to the prosecution of the concern. The directors too were the persons who were to procure the Act of Parliament, and it was to their discretion alone, subject to given provisions in the deed restraining and regulating it, that the subscribers committed their interests in that respect; but the committee was formed partly of directors and partly of other

members, and was an entirely new body to whom no such authority or discretion was delegated. It seems, therefore, to me, that the Act is clearly out of the question ; and with respect to obtaining the orders, which turned out an abortive proceeding,
 * 161 that does not * appear to have entered the minds of the parties until after they had abandoned all idea of winding up the concern under the existing law.

Whether then this committee did or did not render any public service in making more efficient the Act of Parliament which ultimately passed, is a matter with which this Court has nothing to do. If they did, they must be content with taking the credit of having done so ; but it can furnish no ground for the particular charge now sought to be established against the company. It appears to me that they had no authority to incur any part of the bill of costs in question, and that the order pronounced by the Vice-Chancellor must be affirmed, and the present motion dismissed with costs.¹

The SUTTON HARBOUR IMPROVEMENT COMPANY v.
 HITCHENS.²

1851. December 10. Before the LORDS JUSTICES.

An incorporated company were improving a harbour under the powers of an Act, whereof the provisions of the Lands Clauses Consolidation Act, 1845, were made part. In the course of the works a coffer dam was made, which temporarily prevented ships from approaching so near the warehouses adjoining the harbour as they had been accustomed to do. A lessee of such a warehouse claimed compensation for the damage thus occasioned to him to the amount of 65*l.*, or to have the same ascertained by arbitration. The Court refused to grant an injunction restraining him from proceeding under the compensation clauses of the Lands Clauses Consolidation Act.³

Semble, that a company does not, by nominating under protest an arbitrator in pursuance of the Lands Clauses Consolidation Act, 1845, admit that the case is one entitling the claimant to any compensation.

Where a bill had been filed by a company for an injunction in the circumstances above stated, and on an appeal from an order dismissing bill without costs,

¹ See 2 Lindley Partn. (Eng. ed. 1860) 1144.

² S. C., 13 Beav. 410 ; 15 Beav. 161 ; 16 Beav. 381.

³ See *Broadbent v. Imperial Gas Co.*, 7 De G., M. & G. 436.

the cause was by consent treated as having come on regularly to be heard, the Court *held* that the suit was justified by the decision in *London and North-Western Railway Company v. Smith*, and gave no costs, but gave the defendant leave to apply as to costs if he succeeded in obtaining compensation.¹

THIS was an appeal from an order of the late Master of the Rolls, granting an injunction.

Under the provisions of a special Act, and of the Harbours, * Docks, and Piers Clauses Act, 1847 (with which * 162 the Lands Clauses Consolidation Act, 1845, is incorporated), the plaintiffs (who were an incorporated company) were enlarging and improving the harbour of Sutton Pool at Plymouth, and were excavating the bed of the pool, so as to deepen the water alongside a quay and wharf adjoining the harbour. For the purpose of these operations, it was necessary to erect a coffer dam, which, during the progress of the works, prevented access to a portion of the harbour.

Martin Hitchens, the defendant, was a coal merchant, occupying and carrying on business at a coal store, lying to the west of that part of the harbour which was enclosed by the coffer dam.

On the 12th November, 1850, he caused to be served upon the plaintiffs a notice, which, after describing him as lessee of certain warehouses, hereditaments, and premises situate and being adjacent to Sutton Wharf, in Sutton harbour, then in his occupation, required payment of compensation in respect of his hereditaments and premises, which the company had damaged and injuriously affected, in the execution of their Acts of Parliament in that behalf, and in respect of his interests therein; and stated that the amount of his claim for compensation by reason of the premises was 65*l*. And he further signified that, in case the company failed to pay the same within seven days from the date of the notice, the amount of compensation should be settled and ascertained by arbitration, in the manner mentioned in, and for such purpose provided by, the Lands Clauses Consolidation Act, 1845, or other the Act or Acts of Parliament in that case made and provided.

The sixth section of the Harbours, Docks, and Piers * Clauses Act, 1847, enacts, that the undertakers shall make * 163 to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of that or the

¹ 1 Dan. Ch. Fr. (4th Am. ed.) 791, and cases cited in note (10).

special Act, or injuriously affected by the construction of the works thereby authorized, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners and occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers vested in the undertakers by that or the special Act, or any Act incorporated therewith.

The case made by the bill and the affidavits on which the injunction was granted, was, that the plaintiffs had not taken or made use of any land or building belonging to the defendant, or in which he was interested, but that he claimed to be entitled to compensation in respect of alleged additional expense incurred by him in conveying coals to and from his coal store, from and to ships in the said harbour, in consequence of the coffer dam preventing such ships approaching so near to his store as they might (as he alleged) otherwise have done. That the harbour master was entitled by law to regulate the position in which ships took in and discharged their cargoes in the harbour, and that in fact he had regulated the position in which the ships, from and to which defendant had conveyed coals, had discharged and taken in their cargoes. That the works which the company had executed had greatly improved the harbour and enabled ships to come alongside the quay, called Sutton Wharf, at all states of the tide, and that vessels had been previously unable to come alongside of the wharf excepting at spring tides, and that such works would occasion a considerable saving to the defendant and other persons having occasion to ship or unload goods to or from ships arriving in the harbour ;

* 164 and that the improvement * in the harbour by means of these works would much more than compensate the defendant for such (if any) additional expense as he might have incurred. That the coffer dam had been removed, and that no obstruction whatever at present existed to the full use by the defendant of his premises. That there was not any provision in the Lands Clauses Consolidation Act, 1845, or in any other Act of Parliament, for ascertaining in the first instance whether a case was one in which a party was entitled to compensation, and such question could not be determined in the first instance without the aid of a Court of Equity ; and that under the circumstances it was inequitable that the defendant should avail himself of the provisions of the Lands Clauses Consolidation Act, 1845, by proceeding to an arbitration, until it should have been previously ascertained that he was entitled

to some compensation. The prayer of the bill was for an injunction to restrain the defendant from proceeding to an arbitration under the Lands Clauses Consolidation Act, 1845, under or pursuant to his notice, and that proper directions might be given for having his right to compensation determined in the first instance.

The plaintiffs moved for an injunction on notice before the late Master of the Rolls, who after hearing counsel on both sides granted an injunction as sought by the bill.

Mr. Glasse in support of the appeal, cited *The East and West India Docks, &c.*, v. *Gatlke*, (a) and *South Staffordshire Railway Company v. Hall*, (b) and submitted that by these authorities the case of *London and North-Western Railway Company v. Smith*, (c) was virtually overruled.

* *Mr. R. Palmer* and *Mr. C. Hall* for the respondents. — * 165
The bill in this case is framed upon the form of that in *London and North-Western Railway Company v. Smith*, which case we submit has never been overruled. In both the subsequent cases, cited on the other side, the obstruction was an interference with private property, and not with a public right, in which respect they differed from *London and North-Western Railway Company v. Smith*; and Lord TREBULO expressly took that distinction, and guarded himself against being understood as intending to overrule *London and North-Western Railway Company v. Smith*. [Lord Justice KNIGHT BRUCE. — Suppose an excavation in a public way such as to prevent a man from leaving his house, or suppose, by a street being torn up, a haberdasher's shop to be deserted by its customers. Can these be called cases of mere public nuisance? (d).] Still, according to the case decided by Lord COTTENHAM, a Court of Equity will not allow a company to be involved in needless litigation, as to the amount of the damage in such a case, before it is ascertained whether there has been any which entitles the claimant to compensation; and the defendant's notice placed the company in this dilemma, that if they appointed an arbitrator, they would thereby admit that some compensation was due; and if they omitted to nominate an arbitrator, and they were ultimately

(a) 3 Mac. & G. 155. (b) 1 Sim. N. S. 373. (c) 1 Mac. & G. 216.
(d) See *Rex v. London Dock Co.*, 5 Ad. & E. 178.

held liable, the full amount of the claim would be enforced against them. They cited *Rex v. Bristol Dock Company*. (a)

[Lord Justice KNIGHT BRUCE referred to *Regina v. Eastern Counties Railway Company*. (b)]

* 166 * In that case the road was lowered, and access to the plaintiff's house impeded. The sixth section of the Harbours, Docks, and Piers Clauses Act, 1847, shows in respect of what damage compensation is to be given; viz., damage by reason of the exercise of the powers of the Act, "as regards such lands," that is to say, the lands of the person complaining.

THE LORD JUSTICE KNIGHT BRUCE. — It is not necessary to dispute the proposition that cases have arisen in which this Court has properly interfered to prevent a multiplicity of suits, and what has been sometimes called needless entanglement of rights; and it is not for us to deny the possibility of a case in which that equity would support a bill founded upon an attempt to resort to the powers of enforcing compulsory arbitration which are contained in Acts of Parliament of this description. But in each case its circumstances must be attended to, and if upon an interlocutory application, in a particular instance of the kind, the Court is satisfied that more litigation, more entanglement, and more expense, would be occasioned by interfering than by declining to interfere, it is the duty of the Court to decline acting. Looking at all the circumstances of this case I have come to the conclusion that more litigation, more expense, more delay, more entanglement and more difficulties would be produced by interfering than by declining to interfere, and leaving the parties to their legal rights.¹ I am therefore of opinion that there ought to be no injunction here.

THE LORD JUSTICE LORD CRANWORTH. — I am of the same opinion. I will not needlessly say that a case cannot arise in which such an interposition may take place as that which is now
* 167 sought. But I * may say that where the legislature has distinctly said that a particular course of proceedings shall

(a) 12 East, 429.

(b) 2 Q. B. 347; 2 Rail. Cas. 736, S. C.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1639, 1640, and cases in notes.

be taken, it must be a very strong case to justify the Court in saying that such a course will create unnecessary litigation, and that resort shall not be had to it on that account. In the exercise of the discretionary jurisdiction of the Court as to interfering by injunction on an interlocutory application, the amount in dispute is not altogether immaterial; and this case is distinguished from that of *London and North-Western Railway Company v. Smith*, by the circumstance that only 15*l.* more than the minimum sum mentioned in the 68th section of the Act is claimed here, whereas the sum in dispute there was 2000*l.* I confess, however, that I do not see the force of the reasoning in that case.¹ And I do not understand how the company are concluded by the result of the arbitration, if they submit under protest to nominate an arbitrator. I see no legal difficulty in the way of their afterwards contesting the validity of the proceeding. If any entanglement arises from the process sought to be restrained, it seems to me incalculably smaller than that which would arise from continuing the injunction, and rendering it necessary to bring an action.

Injunction dissolved.

1852. March 29.

After the above order was made, the defendant gave notice of motion before the Master of the Rolls to dismiss the bill with costs, whereupon the plaintiffs gave notice of a cross motion that the bill might be dismissed * without costs. Both motions * 168 came on to be heard together, and the Master of the Rolls declined to make any order on the former motion, and on the latter ordered that the bill should be dismissed without costs.

The defendants appealed from this order, and the appeal now came on to be heard. After some discussion it was agreed that the cause should be considered as having come on for hearing, the affidavits being treated as depositions, and the plaintiffs admitting that in the existing state of the law they could not ask for a decree, and could only argue the question of costs.

Mr. Bethell and *Mr. T. H. Terrell*, for the defendants. — Considering the case with reference to the question of costs only, the suit cannot be said to be justified by that of *London and North-*

¹ See the note to that case and the authorities cited in it. 1 M.N. & G. 224; *Duke of Norfolk v. Tennant*, 9 Hare, 744; *South Staffordshire Railway Co. v. Hall*, 1 Sim. N. S. 373.

Western Railway Company v. Smith, in which the amount in dispute was considerable. In such a case as this (as was said by your Lordships when it was before you upon the motion for an injunction), it was quite clear that infinitely more expense and inconvenience would be produced by the interference of the Court than by its refusal to interfere. Therefore, even if Smith's case were still considered to have been well decided, it would not justify such a suit as the present.

Mr. R. Palmer and Mr. C. Hall, for the plaintiffs. — The case of the *London and North-Western Railway Company v. Smith* (a) was a sufficient authority for the * institution of this suit. And the cases which have been relied on as being at variance with that authority were distinguished from it by the learned Judges who decided them, and who expressly disclaimed any intention of overruling *London and North-Western Railway Company v. Smith*. (a) That case has now, therefore, been for the first time overruled, and this circumstance should exempt the plaintiffs from payment of costs. *Robinson v. Rosher*. (b) If the company had nominated an arbitrator, that step would amount to an admission of the existence of some damage. This, indeed, is a stronger case for the interference of the Court than Smith's case, on account of the provisions of the Harbours, Docks, and Piers Clauses Act.

Mr. Terrell, in reply.

THE LORD JUSTICE LORD CRANWORTH. — We think that the order of the Master of the Rolls was quite right, except that the defendant ought to have had the costs of his motion to dismiss, and with the qualification which I shall mention ; for we think that the bill was filed upon the authority of existing, much-considered decisions, which were sufficient to warrant the plaintiffs in filing the bill, and so to entitle them, as was held by my learned brother in *Robinson v. Rosher*, (b) to have their bill dismissed without costs. It was argued that this was a special case, and not within the authority of *London and North-Western Railway Company v. Smith*, (a) but we look in vain for any valid distinction between them. The cases are as nearly similar as two such cases can be expected to be. It has been said that the smallness of demand ought to induce

(a) 1 Mac. & G. 216.

(b) 1 Y. & C. C. C. 7.

the Court to * say that the bill ought never to have been filed. * 170 That, however, is always a difficult question to deal with, and it seems that there were many other persons besides the defendant who would be affected by the question. We think the case was within the authority of *London and North-Western Railway Company v. Smith*, and as the doctrine on which that case proceeded has been since got rid of,¹ the defendant is entitled to have the bill dismissed, but without costs, so far as that case warranted the institution of the present suit. But there is nothing in that case to lead to the inference that the defendant there would not have had his costs if the case had proceeded, and he had obtained compensation in the action which the Court there held must be brought. And in the present case if the defendant should establish a right to compensation, he will be in a different position from that in which he now stands. We propose, therefore, to vary the order of the Master of the Rolls, by giving the defendant the costs of his motion to dismiss, and to affirm the order in other respects; but to give the defendant liberty to apply as to the other costs of the suit, if he shall before the last day of Trinity term next establish his right to compensation.

* LEAF v. COLES.*

* 171

AND

In the Matter of JAMES COLES, a Lunatic; and of the Act, 8 & 9 Vict. c. 100.

1851. December 10. Before the Lord Chancellor Lord TRURO.

Decree made for the dissolution of a partnership in consequence of the lunacy of one of the partners.²

THE plaintiffs, William Leaf, William Smith, Michael Brunckton, William Saddler Leaf, and Charles James Leaf, were partners

* This cause was heard by special leave before the Lord Chancellor in the first instance, together with the petition.

¹ See 1 M'N. & G. 224, note.

² Collyer Partn. (5th Am. ed.) §§ 292-294; *Jones v. Noy*, 2 M. & K. 125; *Sadler v. Lee*, 6 Beav. 324; *Anon.* 2 K. & J. 441; *Kirby v. Carr*, 3 You. & Col. 184; 3 Kent, 58; *Story Partn.* § 295; *Isler v. Baker*, 6 Humph. 85; *Davis v. Lane*, 10 N. H. 161; *Milne v. Bartlett*, 3 Jur. 356.

with the defendant James Coles as merchants. The object of the suit was to obtain a dissolution as against the defendant James Coles of the partnership then subsisting between him and the plaintiffs. The defendant, who had become lunatic, was found to be such by the report of the Master under the provisions of the Act 8 & 9 Vict. c. 100, though not found such by inquisition.

The bill, which was filed on the 20th November, 1851, stated that the partnership had been constituted by deed, and that it was to have endured for the period of seven years from the 31st December, 1844. It then set out the partnership deed; the only clauses of which material to the present case were the 45th and 60th. By the 45th it was in substance provided, that in case any one of the copartners for the time being in the copartnership, other than William Leaf, should die during the term of seven years, the business of the copartnership should be carried on as usual up to and until the 31st day of December next after the copartnership business and all benefit and advantage thereof

should, as to the partner so dying, cease and determine,
 * 172 with provisions * for the payment of the deceased partner's share in the capital and profits up to the end of December following his death; and by the 60th clause it was provided that twelve calendar months before the expiration of the said term of seven years, all the then partners in the joint trade should meet and determine the conditions of a new partnership, or the terms upon which the then existing one was to be continued or dissolved; and it was provided that if the partners did not meet or could not agree upon one of such courses, then that the stock, goods, wares, and merchandise belonging to the parties should be sold and disposed of by public auction; and after payment of the debts of the partnership, the proceeds of the sale were to be divided among the partners.

The bill then stated that James Coles had taken no part in the management or carrying on of the partnership business since May, 1850, and that he was from that time up to the period of the filing of the bill of unsound mind; and after stating an offer on the part of the plaintiffs, in order to avoid the trouble of taking the accounts, to pay into Court the amount of capital standing to the credit of the defendant in the partnership books on the 31st December, 1850, and interest thereon at 5*l*. per cent, and in lieu of the profits of the year 1851 to pay a similar sum as for the

profits of the year 1850, prayed a dissolution of the partnership as to the defendant James Coles.

The petition was presented in the name of James Coles, by George Coles his brother, who had also appeared and put in the formal answer as guardian in the suit. The petition, after detailing the facts as stated in the bill, prayed a reference to the Master, whether the offer of the plaintiffs above referred to should be accepted.

* The books of account of the partnership on the basis of * 173 which the offer was made, and the evidence of the lunacy, were all formally proved in the cause. In the usual course of business the accounts for the year ending in December, 1851, would not be made up until the June following. It appeared by the books, that the defendant's share of the profits of the partnership had on an average of six years preceding 1850, been about 4500*l.* per annum; it was proposed at once to pay the sum of 4613*l.* into Court, in respect of the defendant's share of the profits for the year ending 31st December, 1851, being the same amount as he was entitled to in respect of the profits for the year ending December, 1850, together with the sum of 66,474*l.* as for the defendant's share in the capital of the partnership. It appeared also, that Mr. George Coles, who had been appointed the receiver of the lunatic's estate under an order in the lunacy, was a merchant, and had examined the accounts, and was satisfied as to their correctness.

Mr. Bethell and *Mr. C. Barber* for the plaintiffs in the suit, the respondents to the petition, referred to the 96th section of the Act 8 & 9 Vict. c. 100, and to the 3d general order in lunacy of the 1st December, 1845, as authorizing the Master in Lunacy to receive proposals as to the estate of the lunatic, and asked for a decree in the terms of the prayer of the bill. They submitted that the incapacity of the lunatic ought to be considered as equivalent to his death; that the proposal therefore of the plaintiffs was liberal, seeing that they had not had the advantage of the defendant's assistance for eighteen months in the business; that by reason of his inability to agree to any terms for the continuance of the partnership, the whole stock of the partnership would, according to the provisions of the 65th clause of the partnership deed, have to be immediately sold by auction, which * would be * 174

equally injurious to the interests of the defendant and the plaintiffs.

Mr. Bacon and *Mr. Stevens*, for the defendant and petitioner, consented on the part of George Coles, the guardian, to the proposed decree for an immediate dissolution of the partnership, and to the terms for the payment of the lunatic's share of the profits of the partnership.

THE LORD CHANCELLOR. — The Court is here asked, under its ordinary jurisdiction, to decree the dissolution of a partnership, on the ground that one of the members is by reason of his lunacy incapacitated from any longer carrying on the affairs of the partnership. It must be understood that it is not every temporary illness or incapacity that should warrant an application for a dissolution of a partnership. Where, however, as in the present case, the incapacity has continued for a period of eighteen months, and the evidence shows a reasonable ground for supposing a recovery to be hopeless, or at least very improbable, during the remainder of the time for which the partnership contract is to endure, I think the application for a dissolution very proper. It is founded upon the incapacity of the defendant to perform that portion of his contract for which he has engaged. The sale by auction of the partnership effects, which, according to the partnership deed, must take place in less than a month, would be productive of no advantage to the defendant, while it might be attended with much detriment to the plaintiffs; and this sufficiently accounts for the unusual course of applying for a dissolution of a partnership, which by the provisions of its deed would expire so shortly by effluxion of time. As then it appears to me that

* 175 the right to a dissolution is established, the only * thing which remains to be considered is, as to the terms upon which it should be carried out. It is quite clear that in the absence of the lunacy, all the parties might by arrangement among themselves have altered any article in their deed of partnership; and that this Court might also have modified the terms of the partnership deed where the justice of the case required it, for, generally speaking, the administration of partnership affairs is within the special province of Courts of Equity. Here, however, the receiver and guardian of the lunatic is a consenting party to

the decree, and, being a merchant, is more competent than the Court to form an estimate as to the fairness of the proposal; and he is also greatly interested, from the fact of his being presumptively entitled to the property of the lunatic.

The net profits of the year 1850 exceed those of 1849, in which year as appears by the evidence the defendant signed and approved the accounts for himself; and the proposed amount of profits for this year, being the same as that realized in 1850, exceeds the yearly average of profits for the six years preceding; but even assuming that it should eventually turn out that the profits of the current year should exceed that of 1850, still it is obvious that no small sacrifice should reasonably be made in order to arrive at a short end; and thus to avoid the delay and expense of taking the account in the Master's office. It seems to me, therefore, that I shall only be doing what is right and fair towards all parties in making the decree which is asked.

* KEKEWICH v. MANNING.

* 176

1851. November 6 and December 15. Before the LORDS JUSTICES.

Residuary estate consisting of money in the funds was bequeathed to a mother and daughter in trust for the mother for life, and afterwards for the daughter absolutely. By a settlement made in contemplation of the daughter's marriage, the daughter assigned her interest under the will to trustees, upon trust for the issue of the intended marriage, and for a niece of the daughter and the issue of the niece. The daughter's husband died soon after the marriage, of which there was no issue. The mother was not a party to the settlement, but had notice of it before the husband's death.

Held, that even if the settlement was voluntary as regarded the trusts in favour of the niece, it was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement against the daughter, and the trustees of another settlement which she made upon a second marriage inconsistent with the former settlement.¹

Whether the first settlement was voluntary as regarded the trust for the niece, *quære*.

¹ See *Scales v. Maude*, 6 De G., M. & G. 43, 51, 52; *Dickinson v. Burrill*, L. R. 1 Eq. 337, 343; 1 Lead. Cas. in Eq. (3d Am. ed.) 297 [199] *et seq.*, and notes to *Ellison v. Ellison*; *Denning v. Ware*, 22 Beav. 184; *Voyle v. Hughes*, 2 Sm. & Giff. 18; *Sugden V. & P.* (14th Eng. ed.) 717, 719; *Donaldson v.*

ROBERT KEKEWICH by his will, in 1822, bequeathed his stocks, funds, and securities, to his wife Elizabeth and his daughter Susannah, in trust for the wife for her life, with remainder to the daughter absolutely; and he appointed his wife and daughter executrixes of his will. The subject of the bequest consisted of 10,500*l.* new 3½ per cents, and 500*l.* long annuities, which were transferred into the names of the executrixes.

In February, 1834, Susannah, the daughter, married Sir Henry Maturin Farrington, and a settlement was made in contemplation of that marriage between Susannah Kekewich of the first part, Sir Henry Maturin Farrington of the second part, and trustees of the third part. It recited the intended marriage, and the agreements made with reference thereto. The witnessing part was thus expressed: "Now this indenture witnesseth, that in pursuance and execution of the said agreement, and in consideration of

* 177 the said intended * marriage, she, the said Susannah Kekewich (with the privity, consent, and approbation of the said Sir Henry Farrington, her intended husband, testified by his executing these presents), hath granted, bargained, sold, assigned, transferred, and set over, and by these presents doth grant, bargain, sell, assign, and set over unto the said Charles Kekewich, Samuel Trehawke Kekewich, and George Granville Kekewich, their executors, administrators, and assigns, all that the said capital sum of 10,500*l.* new 3½ per cent bank annuities, and also all that the said annual sum of 500*l.* long annuities, to which respectively the said Susannah Kekewich is entitled as aforesaid (subject to such life interest therein of the said Elizabeth Kekewich as aforesaid), and all and every the funds and securities, or fund and security upon which the same respectively or any part thereof, now is, or

Donaldson, Kay, 711; 2 Kent (11th ed.) 465, 466; *Neves v. Scott*, U. S. C. C. Georgia, 9 Law Rep. (Boston, 1846), 67; S. C., 9 How. U. S. 197; *Bunn v. Winthrop*, 1 John. Ch. 329, 337; *Minturn v. Seymour*, 4 John. Ch. 497; *Acker v. Phoenix*, 4 Paige, 305; *Wright v. Miller*, 4 Selden, 9; *Andrews v. Holson*, 23 Ala. 219; 1 Story Eq. Jur. §§ 706 a, 787, 793 b, 793 c; 2 ib. § 987; *Bridge v. Bridge*, 16 Beav. 315, 327, 328; *Beech v. Keep*, 18 Beav. 285; 3 Lead. Cas. in Eq. (3d Am. ed.) 366, 367; *Hayes v. Kershaw*, 1 Sandf. Ch. 258; *Jones v. Obenchain*, 10 Grattan, 259; *Dunbar v. Woodcock*, 10 Leigh, 628; *M'Nulty v. Cooper*, 3 Gill & J. 214; *Hunter v. Hunter*, 19 Barb. 631; *Henderson v. Henderson*, 21 Misso. 379; *Penfold v. Mould*, L. R. 4 Eq. 562; *Bridge v. Bridge*, 16 Beav. 318; *Airey v. Manning*, 3 Sm. & Giff. 315; *Parnell v. Hingston*, 3 Sm. & Giff. 337; *Paterson v. Murphy*, 11 Hare, 88.

are, or hereafter shall or may be placed out or invested, and all dividends, interest, and annual proceeds and other produce of the same respectively, and all the estate, right, title, interest, benefit, property, claim, and demand whatsoever, of her the said Susannah Kekewich, of, in, to, and out of the said funds, stocks, and annuities, and each of them, and the dividends and other produce thereof, and of every part thereof respectively; to have, hold, receive, take, and enjoy the said stocks, funds, and annuities, and other the premises hereinbefore assigned or intended so to be, and every part thereof, unto and by them the said Charles Kekewich, Samuel Trehawke Kekewich, and George Granville Kekewich, their executors, administrators, and assigns, subject nevertheless to the life interest therein respectively of the said Elizabeth Kekewich, as aforesaid, upon the trusts, and to and for the several ends, intents, and purposes hereinafter declared or expressed concerning the same; and for the more effectually enabling the said Charles Kekewich, Samuel * Trehawke Kekewich, * 178 and George Granville Kekewich, and the survivors and survivor of them, and the trustee or trustees of this settlement for the time being, to ask, demand, and receive the said capital, stock, and annuities hereinbefore assigned, and all necessary transfers of the same (from and after the decease of the said Elizabeth Kekewich), and all interest, dividends, and accumulations thereof, she the said Susannah Kekewich, with the privity and approbation of the said Sir Henry Maturin Farrington, her intended husband, testified as aforesaid, hath made, ordained, constituted, and appointed, and by these presents doth absolutely and irrevocably make, ordain, constitute, and appoint, and the said Sir Henry Maturin Farrington doth also make, ordain, constitute, and appoint the said Charles Kekewich, Samuel Trehawke Kekewich, and George Granville Kekewich, and the survivors and survivor of them, his executors and administrators, and the trustee or trustees of this settlement for the time being, their and each of their true and lawful attorneys and attorney for them and each of them, and in their or either of their names or name, but upon the trusts hereinafter declared, to ask, demand, recover, and receive, by all lawful ways and means whatsoever, from and immediately after the death of the said Elizabeth Kekewich, the said capital, stock, annuities, and premises hereinbefore assigned, and all necessary transfers of the same, and all interest, dividends, pro-

ceeds, and produce thereof respectively ; and to give acquittances, releases, and discharges for the same, or any and every part thereof respectively, and upon non-payment or non-transfer of the said capital, funds, dividends, and produce, or any part thereof respectively, in the name or names of the said Sir Henry Maturin Farrington and Susannah Kekewich or either of them, or of the trustees or trustee of these presents for the time being, but

* 179 upon the trusts hereinafter declared, * to commence and prosecute all actions, suits, and proceedings, and use, exercise, and enforce all such or the like powers and remedies for compelling payment and transfer of the said capital, funds, dividends, and produce respectively as they, the said Susannah Kekewich and Sir Henry Maturin Farrington, or either of them, might or could do or have done if these presents had not been made. And the said Susannah Kekewich doth hereby (with the like privity and approbation of the said Sir Henry Maturin Farrington, testified as aforesaid) authorize and expressly direct that all and every the person and persons in whom the said stock and annuities, or any part thereof respectively, shall or may be vested on the decease of the said Elizabeth Kekewich, shall and do forthwith, on the decease of the said Elizabeth Kekewich, transfer and make over the said sum of 10,500*l.* new 3½ per cent annuities, and also the said 500*l.* per annum long annuities, and the dividends, interest, and produce thereof, unto the said Charles Kekewich, Samuel Trehawke Kekewich, and George Granville Kekewich, and the survivors and survivor of them, or the trustees or trustee of this settlement for the time being, according to the purport, effect, and true intent and meaning of these presents. And it is hereby expressly agreed and declared, by and between all the said parties hereto, that they the said Charles Kekewich, Samuel Trehawke Kekewich, and George Granville Kekewich, and their executors, administrators, and assigns, and the trustee or trustees of this settlement for the time being, shall stand possessed of and interested in the said sum of 10,500*l.* new 3½ per cent annuities, and the said annual sum of 500*l.* long annuities (subject nevertheless to the life estate of the said Elizabeth Kekewich therein as aforesaid), and of and in the produce, interest, dividends, and annual proceeds * thereof respectively

* 180 upon the trusts, and for the ends, intents, and purposes following (that is to say), in trust for the said Susannah Keke-

wich, her executors, administrators, and assigns, until the said intended marriage, shall take effect and be solemnized." The trusts, after the solemnization of the marriage, were for Susannah Kekewich for her life for her separate use, and after her decease, as to the 500*l.* long annuities, in trust for Sir Henry Farrington for his life, and, after the decease of the survivor, as to the whole of the trust funds, upon such trusts for Elizabeth Bradney (a niece of Susannah Kekewich), and the children of the intended marriage, and for the issue of Elizabeth Bradney, and for the issue of the children of the intended marriage, as Susannah Kekewich should appoint, and, in default of appointment, for Elizabeth Bradney and such children equally, as tenants in common.

The settlement then contained the following proviso:—"Provided always, and it is hereby expressly declared by and between the said parties to these presents, that in case there shall be no child or children of the said intended marriage, or, there being such, all of them shall happen to die before his, her, or their share and interest under the provisions hereinbefore contained shall have become vested as aforesaid, then immediately after the decease of the said Susannah Kekewich (notwithstanding all or any of the trusts, powers, provisos and declarations hereinbefore expressed and declared), the said capital sum of 10,500*l.* new 3½ per cent annuities, and the said 500*l.* per annum long annuities (subject nevertheless as to the said 500*l.* per annum long annuities to the interest therein of the said Sir Henry Maturin Farrington for his life as aforesaid), and the *several dividends, interest, *181 and annual proceeds thereof respectively shall be upon the trusts, and for the ends, intents, and purposes hereinafter expressed and declared (that is to say), as to, for, and concerning the said 500*l.* long annuities (subject to the interest for life therein of the said Sir Henry Maturin Farrington as aforesaid), and also as to the capital sum of 5000*l.* stock, part of the said capital stock of 10,500*l.* new 3½ per cent annuities, and the dividends, interest, and proceeds thereof, the same respectively, immediately upon the decease of the said Susannah Kekewich, shall be upon trust for the said Elizabeth Frances Bradney for her own benefit, and become vested in her on her attaining her age of twenty-one years, but not to be payable or transferable until after the decease of the said Susannah Kekewich." The residue of the trust funds was in

the above events to be held upon such trusts as Susannah Kekewich should by will appoint, and in default of appointment in trust for her next of kin.

Mrs. Elizabeth Kekewich had notice of the settlement at or shortly after its execution, but it did not appear that any request was made to her to concur in a transfer of the fund, and no such transfer was made.

There was no issue of the marriage, and Sir Henry Farrington died shortly after its solemnization, leaving Lady Farrington surviving.

In 1838, she married a Mr. Manning. In contemplation of this second marriage, another settlement was made dated in June, 1838, whereby the stock and long annuities were assigned by Lady Farrington to George Manning and another, upon trust, after the decease of Lady Farrington; for such of them, Elizabeth *182 Frances Bradney and the children of the said *second marriage, as Lady Farrington should by will appoint, and in default of appointment for the children of the marriage equally, and if there should be no such children, as to 5000*l.* stock, part of the said 10,500*l.* stock, in trust for Elizabeth Frances Bradney, if she should survive Lady Farrington.

There was issue of the second marriage one child. The second husband died in 1844; Elizabeth, the widow of the testator, died in 1847.

The bill was filed by the trustees of the settlement of February, 1834, and John Bailward and Elizabeth Frances his wife, formerly Elizabeth Frances Bradney, against Lady Farrington, the trustees of the settlement of June, 1838, and the child of the second marriage; and it prayed that Lady Farrington might be ordered to transfer the stock, or 5000*l.* part thereof, and the long annuities into the names of the trustees of the settlement of February, 1834, upon the trusts thereof, and that the same might be executed under the direction of the Court, and that Lady Farrington might be restrained from transferring the said fund into the names of the trustees of the second settlement, or of any persons other than the plaintiffs.

The defendants insisted upon the power of Lady Farrington to make the second settlement, notwithstanding the existence of the deed of February, 1834, and they claimed under the second settlement accordingly.

The Vice-Chancellor dismissed the bill with costs. The plaintiffs appealed from that decision.

Mr. Rolt and *Mr. Bazalgette*, for the appellants.—

* First, the trust for Miss Bradney is sufficiently supported * 183 by the marriage contract. *Marchington v. Vernon*, (a) *Johnson v. Legard*, (b) *Clayton v. Earl of Wilton*, (c) *Ithell v. Beane*, (d) *Heap v. Tonge*, (e) *Gregory v. Williams*, (g) *Gregory v. Nash*, (h) *Osgood v. Strode*, (i) *Davenport v. Bishopp*, (k) *Pulvertoft v. Pulvertoft*. (l)

In *Colgreave v. Lady Mulgrave*, (m) Lord LANGDALE said; “Where two persons for valuable considerations between themselves covenant to do some act for the benefit of a mere stranger, that stranger has not a right to enforce the covenant against the other two, although each one might as against the other.” Here a party to the contract is suing, which therefore brings the case within Lord LANGDALE’S rule.

Secondly, even if the trust should be considered voluntary, still it is a complete gift, since every thing was done of which the subject was susceptible, and to hold the gift to be ineffectual will be to say that an interest of this description cannot be aliened except for value. *Collinson v. Patrick*, (n) *Wheatley v. Purr*, (o) *Rycroft v. Christy*, (p) *Fortescue v. Barnett*, (q) *Ex parte Pye*, (r) *James v. Byddes*, (s) *Ellison v. Ellison*, (t) *Sloane v. Cadoogan*. (u)

* The cases of *Edwards v. Jones*, (v) and others, which * 184 may be cited for the respondents, are not inconsistent with

(a) 1 B. & P. 101 n.

(b) 3 Madd. 302; 6 M. & S. 66; Turn. 281.

(c) *Ibid.*, note, and 6 M. & S. 67.

(d) 1 Ves. Sen. 215.

(h) 3 Atk. 185.

(e) 9 Hare, 104.

(i) 2 P. Wms. 245.

(g) 3 Mer. 582.

(k) 2 Y. & C. C. C. 453; 1 Phil. 701.

(l) 18 Ves. 192.

(m) 2 Keen, 98; and see *M’Fadden v. Jenkyns*, 1 Phil. 155.

(n) 2 Keen, 123.

(r) 18 Ves. 148.

(o) 1 Keen, 551.

(s) 4 Beav. 600.

(p) 3 Beav. 238.

(t) 6 Ves. 663.

(q) 3 M. & K. 36.

(u) *Sugden V. & P.* 1119 (11th ed.).

(v) 1 M. & C. 226.

this argument. The utmost that they will be found to establish in favour of the respondents is, that where the property consists of a merely legal interest, an alienation of it which does not give a complete legal title will not be enforced in equity at the instance of a mere volunteer. Supposing the doctrine established even to that extent, it cannot apply to a case where the property being equitable, an assignment is a complete alienation.

Mr. Metcalfe, for the respondents. — In the first place, the plaintiffs are volunteers; for Miss Bradney being a niece only of the intended wife, cannot be considered within the consideration of marriage, so as to support a settlement of the intended wife's property. *Sutton v. Chetwynd*, (a) *Cotterell v. Homer*. (b)

Secondly, the Court will not assist a volunteer if the gift is not complete, but any thing remains to be done.

Thirdly, the transaction is imperfect. There is no declaration of trust, nor is the legal estate in the plaintiffs. They are obliged to come to this Court to enforce the agreement. The settlement is not, in form or substance, a declaration of trust; it is an assignment. It is settled that the Court will not convert an imperfect gift into a trust. *Holloway v. Headington*, (c) *Dillon v. Coppin*, (d) *Antrobus v. Smith*, (e) *Edwards v. Jones*. (g)

* 185 * In *Colyear v. Lady Mulgrave*, (h) referred to on the other side, the decision was against the voluntary deed. *Ward v. Audland* (i) is decisive against the appellant. *Jefferies v. Jefferies*. (k)

[The Lord Justice KNIGHT BRUCE referred to *Ellis v. Nimmo*, (l) and asked if the argument was that the word "trust" or "confidence" must be used to create a trust.]

In *Meek v. Kettlewell*, (m) Vice-Chancellor WIGRAM said: "If the owner of property, having the legal interest in himself, were to execute an instrument by which he had declared himself a

(a) 3 Mer. 249; Turn. 296; and see 2 Y. & C. C. C. 456; Sug. Law of Property, 153.

(b) 13 Sim. 506.

(c) 8 Sim. 328.

(d) 4 M. & C. 647.

(e) 12 Ves. 39.

(g) 1 M. & C. 226.

(h) 2 Keen, 81.

(i) 8 Beav. 201.

(k) Cr. & P. 138.

(l) Lloyd & G. C. t. Sug. 333.

(m) 1 Hare, 475.

trustee for another, and had disclosed that instrument to the *cestui que trust*, and afterwards acted upon it, that might perhaps be sufficient." "Again, if the equitable owner of property, the legal interest of which was in a trustee, should execute a voluntary assignment of the property, and authorize the assignee to sue for and recover the property from that trustee, and the assignor should give notice to the trustee, and the trustee should accept the notice, and act upon it, by paying the dividends or interest of the trust property to the assignee during the life of the assignor, and with his consent, it might be difficult for the executor or administrator of the assignor afterwards to contend that the gift of the property was not perfect in equity. But such circumstances do not occur in the present case."

The reasons assigned by Sir J. WIGRAM for his decision in the present case, are altogether unanswered by the argument for the appellants. They are among others these:—

* In a case in which there are no means of transferring the * 186 property in law, and there is an agreement to transfer, it is admitted that in the absence of consideration the Court will not convert that voluntary agreement into a trust. Therefore, if the person having the property is called upon to transfer it, this Court will not enforce the demand. Again, supposing the subject in dispute to be property which cannot be transferred at law by the act of the beneficial owner, and instead of there being an agreement to transfer, the transaction takes the form of an absolute assignment; still, if there be a want of consideration, and the deed of itself is inoperative as an assignment, then it is well settled that in the absence of consideration, this Court does not distinguish the assignment in form from the agreement to assign. On the other hand if there be a consideration, it is immaterial whether it be an agreement or an assignment.

With regard to the argument that where the parties could do no more than they have done, there the Court must consider that they have done sufficient to deprive themselves of all interest in the property, the case of *Edwards v. Jones* (a) is as distinct in answer as any thing could possibly be to that argument. There the obligee of a bond, five days before his death, indorsed upon it that which in form was an assignment, and parted with the pos-

(a) 1 M. & C. 226.

session of the bond to the person to whom he desired to transfer it.

Nor can it be said that the trustee of the property, at the time when the settlement was made, was a party to it; for Lady Far-
rington was not a party to the deed as a trustee, but as a party
beneficially interested; and the whole scope of the instru-
* 187 ment went to this, that * she assigned her interest in the
property when it should fall into possession to trustees to
be held by them on certain trusts. If the mother and daughter
had accepted the trusts, the transaction might perhaps be said to
have been complete.

[Lord Justice KNIGHT BRUCE asked if the respondents' case
could be supported consistently with *Sloane v. Cadogan*, (a) and
Fortescue v. Barnett. (b)]

Mr. Metcalfe.—Those cases must be considered as, in effect, no
longer binding authorities. *Beatson v. Beatson*, (c) *Colman v.*
Sarrell, (d) *Meek v. Kettlewell*, (e) *Edwards v. Jones*, (g) *Sug-*
den, Vendors and Purchasers. (h)

Mr. Rolt, in reply.

December 15.

THE LORD JUSTICE KNIGHT BRUCE.—The present case has raised,
necessarily or unnecessarily, a question which on several occasions,
under different aspects, and in various circumstances, has been
brought before this Court, especially since the time of Lord HARD-
WICKE, — the question, namely, whether an act or intended act of
bounty, — whether a gift or a promised or intended gift, was in
truth a perfect act, a completed gift, resting neither in promise
merely, nor merely in unfulfilled intention; or was incomplete,
was imperfect, and rested merely in promise or unfulfilled inten-
tion.

Generally, this question, when arising here, is very mate-
* 188 rial. For as, upon one hand, it is, on legal and * equitable
principles we apprehend, clear that a person *sui juris*, acting

(a) *Sugden V. & P.* (11th ed.) 1119.

(b) 3 M. & K. 36.

(c) 12 Sim. 294.

(d) 3 Bro. C. C. 12; 1 Ves. Jr. 50.

(e) 1 Hare, 475.

(g) 1 M. & C. 226.

(h) p. 934, 11th ed.

freely, fairly, and with sufficient knowledge, ought to have and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary, and howsoever circumstanced, so, on the other, it is as clear generally, if not universally, that a gratuitously expressed intention, a promise merely voluntary, or to use a familiar phrase, *nudum pactum*, does not (the matter resting there) bind legally or equitably.¹ I have been speaking of transactions without any sealed writing. But though it is true that in cases where such an intention, such a promise, is expressed in a deed, it may bind generally at law as a covenant by reason of the light in which the particular kind of instrument called a deed is regarded at law, yet in equity, where at least the covenantor is living, or where specific performance of such a covenant is sought, it stands scarcely, or not at all, on a better footing than if it were contained in an instrument unsealed.² The rules and the distinction or distinctions

¹ See *Scales v. Maude*, 6 De G., M. & G. 43, 51; *Sherwood v. Andrews*, 2 Allen, 79, 81, 82; *Caldwell v. Williams*, 1 Bailey Eq. 175; *Crompton v. Vessee*, 19 Ala. 259; *Hayes v. Kershaw*, 1 Sandf. Ch. 258, 261; *Reid v. Vanarsdale*, 2 Leigh, 560; *Pinckard v. Pinckard*, 23 Ala. 646; *Evans v. Battle*, 19 Ala. 398; *Dawson v. Dawson*, 1 Dev. Eq. 93; *Dening v. Ware*, 22 Beav. 184; *Crofts v. Middleton*, 8 De G., M. & G. 192, 211.

² In *Dennison v. Goehring*, 7 Barr, 175, 178, GIBSON C. J., said: "Equity will not enforce a contract to create a trust though it were under hand and seal; and in this respect it carries the doctrine of *nudum pactum* further than even the law does; but the difference between a covenant to create a trust, and a trust created, is as wide as the difference between a covenant to convey and a conveyance executed." "The reason of the difference with regard to the effect of a seal is, that the interposition of a Chancellor is matter of favor; but that the interposition of a Court of Law, with whom a seal stands for a consideration, is matter of right. While a contract for a trust, therefore, is executory, the trust itself is held to be executory; and it stands on the footing of any other executory contract, in respect to which a Chancellor is guided by his apprehension of the justice of the contract in applying or refusing his power to the execution of it; but when the legal estate has passed by a conveyance in which a trust is distinctly declared, the trustee will not be allowed to set up want of consideration to defeat it." See *Tolar v. Tolar*, 1 Dev. Eq. 456. In *Munn v. Winthrop*, 1 John. Ch. 329, Mr. Chancellor KENT held, in regard to chattel interests, that an agreement under seal imports a consideration at law; and that, therefore, a bond or deed of a chattel interest, though voluntary and without consideration, will be supported in equity, and will support a decree for executing the trust. As to the distinction between executed and executory trusts, see further, 1 Lead. Cas. Eq. (3d Am. ed.) 1, and notes to case of *Lord Glenorchy v. Bosville*.

between them are, in theory, plain and simple enough, but are sometimes found to be of difficult application practically; nor, considering the position and circumstances, in many instances, of property, the administration of which, or the decision of the title to which, belongs to this jurisdiction, ought one to be surprised if he should find here occasionally a case so near the boundary line separating the two main classes, as to render it no light or easy task to say to which side of it the case belongs. Such instances have occurred not very unfrequently. To state, however, a simple case:—Suppose stock or money to be legally vested in A. as a trustee for B. for life, and, subject to B.'s life interest, for C. absolutely; surely it must be competent to C. in B.'s lifetime,

* 189 with or without the consent of A., to make * an effectual gift of C.'s interest to D. by way of mere bounty, leaving the legal interest and legal title unchanged and untouched. Surely it would not be consistent with natural equity or with reason or expediency to hold the contrary, C. being *sui juris* and acting freely, fairly, and with sufficient advice and knowledge. If so, can C. do this better or more effectually than by executing an assignment to D.? It may possibly be thought necessary to the complete validity of such a transaction, that notice should be given to A. Upon that we do not express an opinion.

Suppose the case only varied by the fact that A. and C. are the trustees jointly instead of A. being so alone? Does that make any substantial difference as to C.'s power, the mode of making the gift, or the effect of the act, C. not severing nor affecting the legal joint tenancy? C. would necessarily have notice. Possibly it may be thought material that A. should have notice likewise, but upon that we avoid saying any thing beyond referring to *Meux v. Bell*, (a) and to *Smith v. Smith*, mentioned in *Meux v. Bell*.

It is probably or certainly in some instances the course of this jurisdiction to decline acting at the suit of those whom it terms "volunteers," though within that description a person claiming directly, and merely, under a gratuitous promise, oral or not under seal, which is *nudum pactum*, may be thought perhaps hardly to come, for such a person has in effect had no promise at all. In effect no contract has been made with him. But whatever rule there may be against "volunteers" it does not apply to the case of

(a) 1 Hare, 73.

one who, in the language of this Court, is termed a *cestui que trust*, claiming against his trustee. For that which is considered by this jurisdiction a trust may certainly be created gratuitously. * So that the absence of consideration for its * 190 creation is in general absolutely immaterial. To this doctrine Lord ELDON often referred. He did so especially in *Ellison v. Ellison*, (a) *Pulvertoft v. Pulvertoft*, (b) and *Ex parte Pye*. (c) In which two latter cases his language is sufficient to correct any erroneous notion of his views that some part of his judgment in *Ellison v. Ellison*, narrowly construed, might possibly in some minds create.

*Ellison v. Ellison*¹ is among the valuable and instructive cases, various in kind and many in number, which we owe to the great learning, great carefulness, and great powers of that most distinguished man. With reference to the present litigation it is of the utmost importance. The necessity of sparing time as much as reasonably possible, and the recollection that probably every member of this bar is familiar with the report, alone prevent me from reading it now throughout. Let the report however be considered as read; and let it be particularly borne in mind that when Mr. Ellison executed the deed of 18th June, 1796, he had an equitable interest, and only an equitable interest, in the property, wholly personal, but partly movable and partly immovable, which was the subject of the deed; that the legal interest became afterwards, and probably at his own request, vested in him by means of the indenture of 3d July, 1797, which seems not to have taken notice of the deed of 1796, but to have been just such an instrument as would have been proper if the deed of 1796 had never existed; that the

(a) 6 Ves. 656. [Sumner's ed. note (a), and cases cited.]

(b) 18 Ves. 84. [Sumner's ed. note (d).]

(c) 18 Ves. 140.

¹ In this case (6 Ves. 662), Lord ELDON stated the doctrine to be, that if the assistance of a Court of Chancery is wanted to raise an interest by way of trust, on a covenant, or executory agreement, there must be a valuable or meritorious consideration; but if the actual transfer be made, the equitable interest will be enforced; for the transfer constitutes the relation between trustee and *cestui que trust*, though voluntary and without consideration. This conclusion was adopted in *Munn v. Winthrop*, 1 John. Ch. 329, 337, by Mr. Chancellor KENT, who held that a voluntary conveyance or settlement, though retained by the grantor in his possession until death, is good.

trustee of the property before, and independently of the deed of 1796, was the trustee of the deed of 1796, and the assignor of 1797; that whether this trustee, who had died before the suit, had notice of the deed of 1796 previously to his execution of the deed of 1797, or perhaps even in Mr. Ellison's lifetime,

* 191 * does not appear clearly, or does not appear at all, and that the deed of 1796 was after Mr. Ellison's death enforced against his residuary legatees; at the instance, I agree, of plaintiffs, of whom one was Mr. Ellison's executrix. The decision, however, seems not to have turned in any degree on that circumstance, but would, it is our clear impression, have been the same had the parties to the suit been reversed or had the eldest son been plaintiff alone. The ordering part of the decree which we have had extracted from the registrar's book is thus: "Whereupon, and upon debate of the matter, and hearing the deed of trust dated the 18th June, 1796, read, and what was alleged by the counsel on both sides, his Lordship doth declare that the trusts of the said deed, bearing date 18th June, 1796, ought to be performed and carried into execution, and doth order and decree the same accordingly. And it is further ordered and decreed, that it be referred to Mr. Ord, one of the Masters of this Court, to appoint a new trustee or trustees of the premises comprised in the said trust deed, and that the share of the said testator Nathaniel Ellison, of and in the said collieries, and the stock and effects belonging thereto comprised in the said deed, be assigned to such new trustee or trustees so to be appointed upon the trusts, and for the intents and purposes declared by the said deed concerning the same, and such new trustee or trustees is or are to declare the trusts thereof accordingly, and the said Master is to settle such assignment; and it is ordered that the said Master do tax all parties their costs of this suit, and that such costs, when taxed, be paid out of the estate of the said testator, and any of the parties are to be at liberty to apply to this Court, as there shall be occasion." Some years afterwards occurred *Pulvertoft v. Pulvertoft*, and *Ex parte Pye*. In the former

of these, Lord ELDON after saying of Lord THURLOW,
* 192 * "I must take his opinion to have been, as I believe it was, that with a mere voluntary settlement this Court has nothing to do," used this language: "The distinction is settled that in the case of a contract merely voluntary (I do not speak of val-

uable or meritorious consideration), this Court will do nothing; but if it does not rest in a voluntary agreement, but an actual trust is created, the Court does take jurisdiction."

And in *Ex parte Pye*, (a) it is said by the same authority: "The other question involves, not only the construction of the French law, and the point whether that has been sufficiently investigated, but further, whether the power of attorney amounts here to a declaration of trust. It is clear that this Court will not assist a volunteer: yet if the act is completed, though voluntary, the Court will act upon it. It has been decided, that upon an agreement to transfer stock, this Court will not interpose; but if the party had declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more, and the Court will act upon it."

The case of *Cadogan v. Sloane*, (b) (commonly called *Sloane v. Cadogan*), the nature and effect of which the whole profession knows, from a valuable note in one of Sir Edward Sugden's works, and which we have examined in the registrar's books, is a decision also of great weight. The plaintiff there was the widow and executrix of Mr. William Bromley Cadogan. The defendants were the surviving trustee of the original settlement of 1747, and the executors of Lord Cadogan, of whom that trustee was one. It does not, we believe, appear that in *Cadogan v. Sloane* any point was, if any could have been, made, as to notice or the absence of notice, or as to the position of the legal title. It is observable, however, that Sir E. SUGDEN in arguing the * cause said: *198 "Here Mr. Cadogan did all he could, but that is not enough." Sir E. SUGDEN was certainly as unlikely as any man could be to omit any view or suggestion possibly favourable to the side on which he was counsel, though I think that I have heard him say that it was the first case that he ever argued in Court, and there were other counsel of great consideration upon the same side. Perhaps *Cadogan v. Sloane* could not have been decided as to the point of gift or trust, otherwise than it was, without contravening *Ellison v. Ellison*. In *Antrobus v. Smith*, (c) which was near the time of *Cadogan v. Sloane*, but we think before it, there were very particular circumstances. The property seems to have been Scotch,

(a) 18 Ves. 140.

(b) Sugden V. & P. 1119 (11th ed.)

(c) 12 Ves. 39. [Sumner's ed. note (a).]

and though probably the legal title might have been rightfully and effectually transferred or changed by Mr. Crawford at his pleasure, he seems not to have so acted, but seems to have retained it. Sir W. GRANT, who appears to have dismissed the bill on the ground that Mr. Crawford was not at his death a trustee for Mr. or Mrs. Antrobus, upon the particular facts and in the particular circumstances of the case, did not in our opinion mean to do or to say any thing of a nature with which that eminent Judge's decision or language in *Cadogan v. Sloane* was at variance. In our view *Cadogan v. Sloane* is entirely consistent with the decision in *Antrobus v. Smith*, but, if it is not, we think *Cadogan v. Sloane* the preferable and more correct decision, — subject only to the question, if any, of notice.

In an earlier case, *Coleman v. Sarel* (of which the *turpis contractus* or *turpis causa* was sufficient to dispose), the alleged donor George Davy had (as probably Mr. Crawford, in *Antrobus v. Smith*, had) the power and right of varying and transferring the *194 legal title, but did *not do so; nor did George Davy, we believe, make use of the term "confidence" or "trust," or the word "trustee," circumstances to which attention was due, but which perhaps were not of themselves decisive. We do not know certainly that if a man entitled beneficially to the absolute interest in stock standing in his name should deliberately and advisedly execute a deed declaring himself a trustee of the stock for certain purposes to take effect immediately, and should communicate and deliver the deed to the *cestuis que trustent* or one of them, this Court would decline to enforce the trusts against their author, because he executed the deed, though fairly and advisedly yet voluntarily, that is to say, without consideration. Nor do we know that an instrument may not be effectual as a declaration of trust, or tantamount to a declaration of trust, though it contain not the word "confidence," the word "trust," or the word "trustee." And this we should have said, even if Lord ELDON had not in *Ex parte Pye* (a) expressed himself and acted as he did with respect to the French annuity there in question. In the recent case of *Edwards v. Jones*, (b) however, the subject of the alleged gift, a bond debt, was from its nature incapable of being legally assigned, incapable of being transferred at law. Notice certainly of the

(a) 18 Ves. 140.

(b) 1 M. & C. 226.

assignment does not appear to have been given to the debtor, though whether that circumstance was material or immaterial the decision seems not to have proceeded upon it, and was against the alleged gift. But *Fortescue v. Barnett*, (a) decided by Sir JOHN LEACH, *Wheatley v. Purr* (b) by Lord LANGDALE, and *Blakeley v. Brady* (c) by Lord PLUNKETT, have without question followed *Cadogan v. Sloane*, and if it could require support supported it.

* Having, with my learned brother's concurrence, made * 195 these remarks on his behalf, as well as my own, I proceed to the particular circumstances of the case before the Court.

In the year 1834, a sum of 10,500*l.* three and a half or three and a quarter per cent bank annuities, and a sum of 500*l.* per annum long annuities, were standing in the joint names of Mrs. Elizabeth Kekewich and her daughter Miss Susannah Kekewich, in the books of the Bank of England. The property was derived immediately from Mr. Robert Kekewich, the deceased husband of one of the ladies, father of the other.

The ladies, under his will, held these sums as trustees for their own benefit; that is to say, for the benefit of Mrs. E. Kekewich for her life, and subject to her life interest for the absolute benefit of Miss Kekewich.

They had therefore between them as well the whole beneficial as the whole legal interest in the property. In this state of things Miss Kekewich having attained her majority agreed to marry Sir Henry Maturin Farrington, and in contemplation of that marriage executed a deed of settlement dated the 1st of February, 1834, which was also executed by him. The material parts of this deed were thus: [his Lordship stated them as set out above].

Soon after the execution of this instrument by Sir Henry Farrington and Miss Kekewich, and the three trustees of it, the intended marriage was solemnized. The husband, Sir Henry Farrington, died, however, soon afterwards, and there never was any issue of the marriage.

It will have been observed that Mrs. Elizabeth Kekewich was not a party to the deed, but contemporaneously with it, or at least in Sir Henry Farrington's lifetime, she had notice of it. She survived him several * years, and died shortly before the in- * 196

a) 3 M. & K. 36.

(b) 1 Keen, 551.

(c) 2 Dr. & Walsh, 311.

stitution of the present suit. Upon her death, the legal title to the bank annuities having remained as I have stated, that legal title became vested, of course, by survivorship, in Lady Farrington solely, and so it now continues. But between the deaths of Sir Henry Farrington and Mrs. Elizabeth Kekewich, certain trusts of the bank annuities were for a valuable consideration created by Lady Farrington, so far as she could, and declared by her, which are at variance with the trusts of the settlement of 1834, and opposed to them. And the question in the cause is, whether against the trusts so created or attempted to be created, after Sir Henry Farrington's death, whether against the present wishes of Lady Farrington, who now desires to resist and defeat the settlement of 1834, that settlement ought to stand and prevail, the legal title, as I have said, having continually and uniformly remained as it was when the settlement of 1834 was made (for the death of Mrs. Elizabeth Kekewich is as to that nothing), and the dealings of Lady Farrington with the property having therefore had effect, if at all, only as to the equitable title.

The plaintiffs in the cause are the three trustees of the settlement of 1834, with Mr. and Mrs. Bailward. That lady was formerly Miss Bradney. She is the person of that name mentioned in the settlement of 1834, and is a grand-daughter of Mr. Robert Kekewich. She has attained majority. The five plaintiffs seek the benefit of the settlement to its full extent; and I may here at once state that, in the opinion of Lord CRANWORTH and myself, the suit is constructed at least as favourably and beneficially for each of the plaintiffs, as if any one or more of them had been the single plaintiff, or the only plaintiffs, and the others or other of them had been among the defendants. Lady Farrington is

* 197 * of course one defendant. The others are the persons claiming under her dealings, since Sir Henry Farrington's death, which have been adverted to, and claiming therefore (as she does) against the settlement of 1834. It may be right here to mention, that it does not appear whether there is or ever was a personal representative of Sir Henry Farrington; of course therefore it cannot be taken that a personal representative of that gentleman is a party to the cause.

The defendants resist the plaintiffs' claim, on the ground that, as the defendants insist, the provision, purporting to be made for Mrs. Bailward by the deed of 1834, was one merely of a voluntary kind,

was nothing more than an intended or a promised gift not perfected, not completed, and ought therefore not to be enforced either at her instance, or at that of the trustees of the deed, by a Court of Equity.

The defendants contend in terms that neither Lady Farrington nor her mother ever became a trustee of the funds for the purposes of the settlement of 1834, or at least for the benefit, to any extent or in any event, of Mrs. Bailward. We should perhaps, however, qualify the last remark by saying, that though Lady Farrington may possibly die intestate, and though by possibility her sole next of kin at her death may be Mrs. Bailward (notwithstanding that Lady Farrington, now the widow of a second husband whom she married in 1838, has a child of that marriage living), we do not recollect that any thing was said in the argument specifically as to any part of the contingent trusts provided by the deed to take effect, if there should be no issue of the marriage of 1834, in the event of Lady Farrington's intestacy. It is true, as has been stated, that Mrs. Bailward has attained majority; but that fact is, as to * a portion of those contingent trusts, imma- * 198
terial. Now of the two persons in whom the legal title to the funds was at the time of the settlement of 1834, and at the time of the marriage that it contemplated,—the two persons in whom the funds were then actually vested at law, and who had then full and absolute power legally over them,—one was a principal party to the settlement of 1834, and the other, who, though not a party to it, had contemporaneously or before Sir Henry Farrington's death certainly notice of it, was beneficially interested in the funds, to the extent already mentioned, by a title paramount, and could not therefore have been rightfully or effectually required to make or join in a transfer of the funds to the trustees of the settlement of 1834, or to affect in any way her legal or equitable title in favour or consequence of that settlement. Why then should the gift (if that is the proper term) be considered inchoate only, or incomplete, or as resting merely in promise? What more could have been done that it was within the power or competency of Sir Henry Farrington or Lady Farrington to do or enforce? Was it to depend on the pleasure of the mother whether the daughter should be able to give away her own property or not? Can a trustee, by saying: "I refuse to accept a trusteeship for the new claimant to a participation in the beneficial interest whom

you, my *cestui que trust*, have introduced or endeavoured to introduce: I object to the claim and oppose it; I will not deal with the legal title, nor shall you," — can a trustee, we repeat, by thus saying and thus acting prevent the *cestui que trust* from making an effectual gift of his interest in the trust property, or any part of it? Surely not. It may be said and perhaps truly, that not only did Mrs. E. Kekewich never make or join in a transfer or declare herself a trustee for the purposes of the settlement of 1834,

subject or not subject to her life interest already mentioned,
 * 199 or so subject * or not so subject, accept a trusteeship for those purposes, or consent to be a trustee either for the trustees of that settlement in that character or for Mrs. Bailward; but that no request having any such object was ever made, and that it is unknown and inconjecturable what Mrs. E. Kekewich would have done had any request or application been made to her. This we think immaterial. How the case would have stood if she had not had notice of the settlement in Sir Henry Farrington's lifetime, or if she had not had any beneficial interest in the funds, but had been merely a trustee of them for Lady Farrington, or, if before the marriage, Lady Farrington had survived her mother, it is altogether unnecessary for us to pronounce any opinion, and we decline doing so. It has been said that there is not to be found any express declaration, or express direction, or express contract, that the trustees of the funds, namely, Lady Farrington and her mother, should become or hold the funds as trustees of them for the purposes of the settlement of 1834, or for the trustees of it in that character, subject or not subject to Mrs. E. Kekewich's life interest. Whether this observation is correct in point of verbal accuracy or not we think it of no weight, being, as we are, of opinion, upon all the language of the settlement of 1834, taken together, that it is, for every purpose, of equal efficacy and value with a formal and plain declaration of the most explicit kind on the part of Sir Henry and Lady Farrington, that she and her mother should, subject to the life interest already mentioned of the latter, stand possessed of the funds in trust for the purposes of that settlement, or for the trustees of it in that character.

We do not attribute essential importance to the clause thus worded: "And the said Susannah Kekewich doth hereby,
 * 200 with the like privity and approbation of the said Sir * H. Maturin Farrington (testified as aforesaid), authorize and

expressly direct that all and every the persons and person in whom the said stocks and annuities, or any part thereof, shall or may be vested on the decease of the said Elizabeth Kekewich, shall and do forthwith, on the decease of the said E. Kekewich, transfer and make over the said sum of 10,500*l.* new three and a half per cent annuities, and also the said 500*l.* long annuities, and the dividends, interest, and produce thereof, unto the said Charles Kekewich, Samuel Kekewich, and George Granville Kekewich, and the survivors or survivor of them, or the trustees or trustee of this settlement for the time being, according to the purposes, effect, and true intent and meaning of these presents." Certainly, however, that clause as a part of the settlement is not to be disregarded, and must be considered especially unfavourable to a portion of the defendants' argument.

We consider the plaintiffs entitled to a decree. But this is on the assumption that we are not precluded by authority from acting on our opinion of what is right. Are we, then, so precluded? The plaintiffs of course contend that we are not; the defendants that we are.

The cases of *Ellison v. Ellison*, (a) *Pulvertoft v. Pulvertoft*, (b) and *Ex parte Pye*, (c) appear to us not merely to contain no doctrine opposed to the plaintiffs, but to be in their favour. Not only do we not question any thing said in either of those cases by Lord ELDON, but we are persuaded that had the present case come before him he would have decided it against the defendants. Of *Antrobus v. Smith*, (d) we need say no more than has already been said. As to *Wheatley v. Purr*, (e) (the report * of * 201 which has "1835" for "1825," and seemingly an incorrect marginal note), the author of the trust could have transferred the legal title, but appears not to have done so. Lord LANGDALE nevertheless established the trust. That case, and those of *Cadogan v. Sloane*, (g) *Fortescue v. Barnett*, (h) and *Blakely v. Brady*, (i) are in our opinion direct and clear authorities for the plaintiffs. But others cited during the argument are said to be strongly opposed to their title to relief. Whether these author-

(a) 6 Ves. 656.

(b) 18 Ves. 84.

(c) 18 Ves. 140.

(d) 12 Ves. 39.

(e) 1 Keen, 551.

(g) Sugden V. & P. 1119 (11th ed.).

(h) 3 M. & K. 36.

(i) 2 Dr. & Walsh, 311.

ities, and particularly whether *Colman v. Sarel*, (a) *Colyear v. Lady Mulgrave*, (b) *Ward v. Audland*, (c) *Holloway v. Headington*, (d) *Dillon v. Coppin*, (e) *Jeffrys v. Jeffeerys*, (g) *Godsal v. Webb*, (h) *James v. Bydder*, (i) *Beatson v. Beatson*, (k) *Bayley v. Boulcott*, (l) *Tufnell v. Constable*, (m) *Gaskell v. Gaskell*, (n) *Farquharson v. Cave*, (o) *Edwards v. Jones*, (p) and *Meek v. Kettlewell*, (q) or any one or more of them, ought in our opinion to be considered as contravening or contravened by *Ellison v. Ellison*, (r) *Cadogan v. Sloane*, (s) *Fortescue v. Barnett*, (t) *Wheatley v. Purr*, (u) or *Blakely v. Brady*, (v) or as opposed to the plaintiffs' title to relief, we think it unnecessary to say; for assuming that contravention, assuming that opposition, we think nevertheless that *Ellison v. Ellison*, (r) *Cadogan v.*

* 202 *Sloane*, (s) * *Fortescue v. Barnett*, (t) *Wheatley v. Purr*, (u) and *Blakely v. Brady*, (v) support and are authorities for the plaintiffs' claim; that we are justified in following those five cases, so far at least as is necessary for the purpose of giving effect to it, circumstanced as it is, and we do so accordingly. In this we are certainly differing from the very able, learned, and careful Judge before whom the suit originally came. He, however, in the particular station which judicially he filled with so much advantage to the country may have considered himself placed in a position with respect to former decisions in which we do not consider ourselves to be.

Hitherto it will have been observed that I have treated the plaintiffs as being what are commonly called in equity "volunteers," as persons claiming under a trust created without consideration and by the mere bounty of Lady Farrington. But is the true view of the case so? The plaintiffs, relying little or not at all on the relationship of Mrs. Bailward, to Lady Farrington and

(a) 3 Bro. C. C. 12; 1 Ves. Jr. 50.

(b) 2 Keen, 81.

(c) 8 Beav. 201.

(d) 8 Sim. 382.

(e) 4 M. & C. 647.

(g) 1 Cr. & Ph. 138.

(h) 2 Keen, 99.

(i) 4 Beav. 600.

(k) 12 Sim. 294.

(l) 4 Russ. 345.

(m) 7 Ad. & Ell. 799.

(n) 2 Y. & J. 511.

(o) 2 Coll. 356.

(p) 1 M. & C. 226.

(q) 1 Hare, 475.

(r) 6 Ves. 656.

(s) Sugden V. & P. 1119 (11th ed.).

(t) 3 M. & K. 36.

(u) 1 Keen, 551.

(v) 2 Dr. & Walsh, 311.

to her father, insist that the participation of Sir Henry Farrington in the settlement of 1884, precludes any effectual contention that Mrs. Bailward is a mere "volunteer." The plaintiffs say that Sir Henry Farrington stipulated and contracted as much for the provision under which Mr. and Mrs. Bailward claim as for any other part of the provisions of the settlement of 1884 (although she is not proved to have been related to Sir Henry Farrington, and although possibly his only acquaintance with her, if any, and his only interest in her, if any, were through his intended wife); and that even if, with the consent of Sir Henry Farrington or a personal representative of that gentleman, any part of the trusts or purposes of the deed might have been or could be varied or disappointed, * there can without that consent be no such * 203 variation, no such disappointment.

We think this contention upon the plaintiffs' part not by any means unworthy of attention. How do we know that Sir Henry Farrington did not take a strong interest in the welfare of Mrs. Bailward? How do we know that he did not believe in the existence of a moral obligation, upon the part of Miss Kekewich, in the circumstances of the case, to make a provision for her niece? How do we know that he would have concurred in any settlement not making a provision for Mrs. Bailward? How do we know that if he had refused to concur in a settlement, the marriage would not have taken place? How could it be known that he would not survive his wife? How is it clear that he was indifferent to her state of freedom as to property, after his death. If she should survive him, or to her marrying a second time, or the consequences of that step?

Were it in our opinion necessary to decide this point, we should probably first deem it prudent to consult carefully various authorities, from *Goring v. Nash*, (a) or earlier, down to *Davenport v. Bishopp*. (b) But we do not consider it necessary. We dispose of the cause on the other view of it,—that into which we have more fully entered; we decide it upon *Ellison v. Ellison*, (c) upon *Cadogan v. Sloane*, (d) and upon principle chiefly, but secondarily also upon *Fortescue v. Barnett*, (e) *Wheatley v. Purr*, (g) and *Blakely v. Brady*, (h) in the plaintiffs' favour.

(a) 3 Atk. 186.

(e) 3 M. & K. 36.

(b) 2 Y. & C. C. C. 453; 1 Ph. 701.

(g) 1 Keen, 551.

(c) 6 Ves. 656.

(h) 2 Dr. & Walsh, 311.

(d) Sugden, V. & P. 1119 (11th ed.).

In the Matter of JONATHAN HIGGINSON, and RICHARD DEANE, Bankrupts.

1851. December 5. Before the Lord Chancellor, Lord TRURO.

A proceeding to review the decision of a commissioner who has refused a certificate under the 39th section of the Act 5 & 6 Vict. c. 122, is not a proceeding for the continuance of which provision is made by the 4th section of the Act 12 & 13 Vict. c. 106, and such proceeding cannot be instituted except on one of the grounds specified in the 207th section of the latter statute.

The expression in the 4th section, that nothing in the Act is "to lessen or affect any right, title," &c., of a person by virtue of proceedings under then existing bankruptcies, has reference only to the continuance and completion of proceedings affecting the administration of a bankrupt's estate.

In 1847 the commissioner refused the allowance of a bankrupt's certificate under the 39th section of the Act 5 & 6 Vict. c. 122; in 1851, after the death of the commissioner, the bankrupt applied to his successor with the view of having the matter reheard, alleging that the statement of the opposing creditor on the occasion of the refusal was partial and imperfect: *Held*, that the application could only be made under the provisions of the 207th section of the Act 12 & 13 Vict. c. 106; and that inasmuch as the refusal of the certificate was not obtained by false evidence or improper suppression of evidence or by fraud the original decision could not be reviewed.

THIS was an appeal, in the form of a special case, from the decision of the Vice-Chancellor KNIGHT BRUCE, dismissing the petition of the appellant Jonathan Higginson. The following were the material facts, as they appeared in the special case.

A *fiat* in bankruptcy was issued in November, 1847, against Jonathan Higginson and his partner Richard Deane, and under this *fiat* they were found bankrupts, and assignees were appointed. J. Higginson passed his final examination on the 20th September, 1848, and, on the same day, the Court appointed a public sitting for the allowance of the certificate, to be held on the 14th October following. On that day, Mr. Commissioner Ludlow refused J. Higginson his certificate, the application being opposed by the assignee, acting also for a creditor, who rested his opposition on the fact of J. Higginson having pledged certain sugars belonging to his creditors, and which were in his possession. The

* 205 * statement made to the commissioner with respect to the pledging was a partial and imperfect statement; but it was

on the ground that the sugars had been pledged, as represented, that the commissioner refused J. Higginson his certificate.

Mr. Commissioner Ludlow having died, J. Higginson on the 27th February, 1851, presented a petition to the District Court of Bankruptcy, for the purpose of having his application for a certificate reheard by the commissioner then acting in the prosecution of the *fiat*. This petition stated to the effect above mentioned, and also set forth matters which were not in evidence before the commissioner when the application of J. Higginson for his certificate was refused, explanatory of the circumstances under which the sugars were pledged: it further stated that J. Higginson was advised that these facts were such as to warrant his renewing his application for his certificate: it prayed that a public sitting might be appointed by the Court for the allowance of the certificate. The petition was heard by Mr. Commissioner Stevenson on the 20th March, 1851, and he made an order dated the 26th March, 1851, which, after stating the petition, was in the following terms: "This Court doth consider that it hath no jurisdiction in the case, and doth dismiss the said petition with costs."

On the 16th April, 1851, J. Higginson presented a petition to the Vice-Chancellor KNIGHT BRUCE, praying a rehearing by his Honor of the petition to the commissioner, and that it might be declared that the commissioner had jurisdiction to hear that petition, and that the order of the commissioner might be reversed, and that the petition might be remitted to the commissioner to be heard and adjudicated upon. This petition * was * 206 heard by the Vice-Chancellor on the 30th April, 1851, and was dismissed by him without costs, his Honor considering that, having regard to the provisions of the Bankrupt Law Consolidation Act, 1849, he could not make an order upon it.

The special case now came on to be argued, together with an appeal petition, which was also presented, praying that the petition presented to the Vice-Chancellor might be reheard before the Lord Chancellor and that an order might be made in conformity with its prayer.

Mr. J. Russell and *Mr. O. Hall*, in support of the appeal.— We submit that the present commissioner has power to review the decision of his predecessor, inasmuch as that decision was founded on imperfect evidence. The case, we admit, does not

fall within any one of the precise conditions on which by the 207th section of the Act 12 & 13 Vict. c. 106, the allowance or refusal or suspension of the allowance of the certificate can be reviewed, but inasmuch as that statute did not come into operation until after the refusal of the certificate by the commissioner in 1848, it cannot be construed so as to have a retrospective effect, the necessary consequence of which would be that all decisions of commissioners previously to the Act would be irreversible. Under the 39th section of the Act 5 & 6 Vict. c. 122, there was no limit to the application for a rehearing before a commissioner to review his decision with respect to the allowance of a bankrupt's certificate; every creditor had a right to be heard against such allowance, and there can be no doubt but that the bankrupt had a corresponding right to be heard against the refusal by the * 207 commissioner * to grant the certificate, the allowance of the certificate by the commissioner being itself an act which required the confirmation of the Court of Review. If the right to have such a decision reviewed were taken away by implication, the position of a bankrupt would be clearly prejudiced by the operation of the 12 & 13 Vict. c. 106, whereas the 4th section of that Act provides that nothing therein is "to lessen or affect any right, title, claim, demand, or remedy" theretofore existing. [They referred to *Ex parte Roffey*, (a) *Ex parte Baker*. (b)]

Mr. Bacon and *Mr. Selwyn*, contra. — When a certificate was applied for under the law as it stood before the passing of the Act 12 & 13 Vict. c. 106, the commissioner had only power (acting under the 39th section of the 5 & 6 Vict. c. 122) to decide once for all, at the time of the application. By that statute the power of granting or withholding the certificate was transferred from the creditors to the commissioner, and it then became a judicial act to be performed by him, from which there has been no instance of a rehearing; and the right to rehear could not have been conceded to a bankrupt without also its being conceded to every creditor. Admitting that the allowance of the certificate by the commissioner under the 5 & 6 Vict. c. 122, was an act which required confirmation by the Court of Review, yet that Court no longer exists. If the present application succeeds, the result will

(a) 19 Ves. 468.

(b) Mont. & M. 279.

be that in all bankruptcies occurring before the passing of the Act 12 & 13 Vict. c. 106, each party to any subsequent proceedings will have the power of electing to avail himself either of the provisions of the repealed Act or of the present *statute, the * 208 exercise of which power would lead to inextricable confusion.

Mr. C. Hall, in reply.

THE LORD CHANCELLOR. — In this case the bankrupt appears to have made an application for his certificate under the 39th section of the Act 5 & 6 Vict. c. 122. Under that section it became the duty of the Court to appoint a public sitting for the allowance of the certificate; but it is to be observed, that the creditors were to have no voice at the meeting; that is to say, the commissioner was to be the sole judge of the party's conformity to the bankrupt laws, and of his conduct as well before as after his bankruptcy: he was also to "judge of any objection against allowing such certificate, and either find the bankrupt entitled thereto and allow the same, or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case may require," — in short, he had power either to decide at once or to reserve his decision, to withhold the certificate altogether or to annex certain conditions on granting it.

In the present case, it appears that the commissioner exercised the jurisdiction thus conferred on him. Having power to reserve the consideration of the question he did not exercise that power, nor did he suspend the grant; but his adjudication was decisive, and he used words clearly importing that the bankrupt was not entitled to his certificate. So matters continued during the life of the commissioner; but subsequently to his death, and after the passing of the Act 12 & 13 Vict. c. 106, the bankrupt applied to another commissioner to appoint a new sitting, in order to ascertain, regard being had to all the circumstances of the case, whether *the bankrupt was or was not entitled to his cer- * 209 tificate. The commissioner, however, attending to the 207th section of the Act 12 & 13 Vict. c. 126, which expressly states the only grounds on which the allowance, refusal, or suspension of a certificate can be reviewed, and perceiving that the application did not fall within any of the circumstances which gave him jurisdiction to review a matter which had been solemnly adjudicated upon by his predecessor, concluded that he had no jurisdiction.

Under the earlier statute there was no provision that the commissioner should rehear a matter as to whether a certificate had or had not been rightly withheld or granted ; in fact he was not to be called upon to come to any other than one decision upon the point of the issuing of the certificate. The cases which have been cited by the appellant stand on a perfectly different footing from the present, and I think that they have no analogy. It appears to me that in this instance all the formalities prescribed by the 39th section of the Act 5 & 6 Vict. c. 122, with the view of obtaining a final determination, were observed ; a public meeting was duly convened, and the attention of the commissioner was called to all the circumstances of the case, and a final judgment was then pronounced by him. It has been asked why the bankrupt should not be allowed to come again before the commissioner, with the view of obtaining the certificate which had in the first instance been refused. It is however to be observed that it is not the object of the legislature, in giving a discharge to a bankrupt, to free a fraudulent trader from his debts, and if, therefore, after a full hearing, the commissioner should be of opinion that the bankrupt is not entitled to his certificate, it would not be just that the creditors should be liable to be called upon to support an

* 210 adjudication whenever and as often as it * may suit the caprice of the bankrupt, and as often as he thinks he can make out a new case for obtaining his certificate. The case of there being additional circumstances which the bankrupt may wish to bring before the notice of the commissioner, is provided for by the section which expressly enables the commissioner to adjourn the consideration of the question to a future meeting, thus giving an opportunity of hearing the matter as fully as the justice of the case may require. When under these circumstances both the bankrupt and the creditors have been heard and a solemn decision pronounced, to admit the right of a bankrupt at his own option to have the matter reheard, would be tantamount to granting him his certificate at once, and would, in effect, be to repeal the essence and substance of the Act. In any inquiry of a judicial nature, like that in question, there must of necessity be some limit to the power of appealing from the decision. The old practice of calling upon the commissioner to reconsider the propriety of the grant of the certificate was quite changed when the commissioner was placed in the situation of a Judge, and his judicial decision was

substituted for the voice of the creditors; and on such a matter once fully heard and discussed, there is much reason to suppose that it was intended that his determination should be conclusive, especially as there is no power, under the Act 12 & 13 Vict. c. 106, to alter or review it, except on certain specified grounds.

The question whether the bankrupt had a right of rehearing under the Act 5 & 6 Vict. c. 126 does not arise, for that statute has been repealed by the Act 12 & 13 Vict. c. 106, except as to certain points which do not now apply. I have therefore to consider whether, under the latter statute, the bankrupt * is entitled to a rehearing. Now, under the fourth, fifth, * 211 and sixth sections, provisions are made for the continuance of certain proceedings instituted under the former Act with the view of accomplishing the end of those proceedings. It has been said that the fourth section expressly contemplates the continuance of rights previously existing; but it appears to me perfectly plain that the effect of that section is not to vary the rights of property, and that its provisions are not to be construed as having relation to subjects of the nature of the present case, but only with reference to the distribution of the funds in a bankruptcy, and matters of that kind.

The only right, therefore, that the appellant can have is under the provisions of the two hundred and seventh section of the Act 12 & 13 Vict. c. 106. His power to have a rehearing, if it ever existed, is gone; but assuming that there was, under the former Act, though by no means admitting it, the same power of rehearing as under the section last referred to, it is expressly provided by that section, that rehearings shall be had only upon certain grounds, those grounds not being applicable to the present case; and I can find no part of the Act 12 & 13 Vict. c. 106, which gives the right to continue proceedings in the sense in which it has been here contended for, or which at all warrants such a view. Taking the most favourable view of the matter for the appellant, it appears to me he has failed to bring his case within any of the grounds on which alone a rehearing can now be had, and under these circumstances, I think the commissioner and the Vice-Chancellor KNIGHT BRUCE were right in refusing the application.

In the absence of any knowledge as to the facts, the Vice-Chancellor may have thrown out some expressions * which * 212 have tended to encourage this appeal; but I do not think

that his declining to make an order on the application implied that he had any doubts upon the construction of the Act. Having regard to all the circumstances of the case, which appears to be the first upon the point, the present application will be dismissed without costs.

*Ex parte CARTER.*¹

In the matter of CARTER, a Bankrupt.

1851. December 5, 12. Before The Lord Chancellor Lord TAUNTON.

Where a bankrupt does not contest the validity of an adjudication of his bankruptcy before a commissioner within the period prescribed by the 104th section of the Act 12 & 13 Vict. c. 106 for showing cause against such adjudication, the commissioner has, after that period, no authority to entertain an application to review the adjudication, either under that section, or under the 233d section.²

THIS was an appeal, by the petitioning creditors in the above bankruptcy, in the form of a special case, from the decision of the Vice-Chancellor KNIGHT BRUCE. The special case contained a statement of the facts to the following effect.

The petition for adjudication of bankruptcy bore date the 15th February, 1851, and was filed by Josiah Dimmock, Timothy Dimmock, and Thomas Keeling, as petitioning creditors, against the bankrupt, in the Court of Bankruptcy for the Birmingham district; and under this petition, the bankrupt was, on the same day, adjudged a bankrupt by one of the commissioners acting in the prosecution of petitions for adjudication of bankruptcy at the said Court. The debt upon which the petition for adjudication was filed, and the adjudication made, was a judgment recovered by the petitioning creditors against the bankrupt in the Court of Exchequer for the sum of 65*l.* 7*s.* 9*d.*, which judgment was entered up on the 23d July, 1850. On the 26th July, 1850, the petitioning creditors issued a writ of *capias ad satisfaciendum*,
 * 218 directed to the sheriff of the county of * Stafford, against the bankrupt upon the judgment, and on this writ the bank-

¹ Affirmed S. C., 4 H. L. Cas. 337.

² See *In re Plumstead*, 2 De G., F. & J. 20; *Ex parte Clarke*, 2 De G. & J. 245; *Ex parte Thornton*, 3 De G. & J. 454.

rupt was, on the 30th July, 1850, duly taken in execution and committed to the county gaol, where he remained confined, under the judgment and execution, up to and at the time of the filing of the petition for adjudication and the adjudication thereunder, and thenceforth until his discharge as after mentioned. On the 19th February, 1851, a duplicate of the adjudication was duly served on the bankrupt personally, and on the same day the bankrupt was discharged from custody, and under such discharge was released from custody by the sheriff. The bankrupt did not, within the time allowed under the 104th section of the Act 12 & 13 Vict. c. 106, show cause against the validity of the adjudication, and notice of the adjudication was duly inserted in the London Gazette of the 28th February, 1851. The first public sitting in the bankruptcy was held on the 10th March, 1851, on which day the bankrupt surrendered.

On the 19th March, 1851, the bankrupt presented his petition to the Court of Bankruptcy for the Birmingham district, and to John Balguy, Esq., a commissioner acting in the prosecution of petitions for adjudication of bankruptcy at the said Court, praying that the petition for adjudication of bankruptcy, or the adjudication thereunder, might be annulled. The petition was heard on the 14th April, 1851, and on that day the Court ordered that the petition of the bankrupt should be dismissed.

On the 23d April, 1851, the bankrupt presented a petition of appeal to Sir J. L. KNIGHT BRUCE, the Vice-Chancellor appointed and sitting in Bankruptcy, praying that his Honor would be pleased to order that the order dismissing the bankrupt's petition might be set * aside with costs, and that the peti- * 214 tion for adjudication, or the adjudication, might be annulled, or that his Honor would be pleased to make such other order in the premises as to his Honor should seem fit. This petition was heard on the 10th May, 1851. At the hearing, the petitioning creditors did not oppose it on the merits; but it was contended on their behalf: first, that as the bankrupt did not, within the time allowed under the 104th section of the Act 12 & 13 Vict. c. 106, show cause to the Court against the validity of the adjudication, his petition to annul the adjudication ought to have been presented to the Vice-Chancellor, and not to the commissioner, and that therefore the petition was properly dismissed by the commissioner; and, secondly, that as the petition to the Vice-Chancellor

was not presented either within twenty-one days from the date of the order of adjudication or within twenty-one days after the notice of the adjudication had been inserted in the London Gazette, such last-mentioned petition was presented too late and therefore ought to be dismissed. The Vice-Chancellor, however, ordered that the adjudication of bankruptcy made on the 15th February, 1851, should be annulled, and that the respondents (the petitioning creditors) should pay to the petitioner his costs of and incidental to that application. From this order the petitioning creditors appealed, insisting that it was erroneous in matter of law and ought to be reversed.

By the 104th section of the Bankrupt Law Consolidation Act, 1849, a bankrupt has, before the advertisement in the Gazette, a period of seven or fourteen days to contest the validity of the adjudication of bankruptcy before the commissioner: by the 233d section, in the event of no action, suit, or other proceeding being taken by him to dispute the adjudication after its advertisement, * 215 in the Gazette, the Gazette containing such advertisement is conclusive evidence of the adjudication; and by the 12th section a period of twenty-one days is limited for appealing from decisions of the commissioner to the Vice-Chancellor. It will be seen that, in the present case, the bankrupt did not take any steps to contest the validity of the adjudication before the commissioner until a period considerably beyond that prescribed by the 104th section; and also that the petition to the Vice-Chancellor was not presented until the twenty-one days allowed by the 12th section and the twenty-one days allowed by the 233d section had respectively expired.*

* The following are the sections of the Act 12 & 13 Vict. c. 106, above referred to:—

Section 12. "That the Court, in the exercise of its primary jurisdiction by virtue of this Act, shall have superintendence and control in all matters of bankruptcy, and shall hear, determine, and make order in any matter of bankruptcy whatever, so far as the assignees are concerned, relating to the disposition of the estate and effects of the bankrupt, or of any estate or effects taken under the bankruptcy and claimed by the assignees for the benefit of the creditors, or relating to any acts done or sought to be done by the assignees in their character of assignees, by virtue or under colour of the bankruptcy, and also in any matter of bankruptcy whatever as between the assignees and any creditor or other person appearing and submitting to the jurisdiction of the Court; and also in any application for a certificate of conformity, and in any other matter

* The special case, which was stated at the instance of * 216 the petitioning creditors, now came on to be argued before the Lord Chancellor.

(whether in bankruptcy or not) where the Court by virtue of this Act has jurisdiction over the subject of the petition or application, save and except as may be by this Act otherwise specially provided, and subject in all cases to an appeal to such one of the Vice-Chancellors of the High Court of Chancery as the Lord Chancellor shall from time to time be pleased to appoint to sit in bankruptcy: Provided always, that if no such appeal shall be entered within twenty-one days from the date of any decision or order of the Court, and be thereafter duly prosecuted, every such decision or order shall be final; and that every appeal shall be subject to such regulation in regard to deposit of costs as shall by any general rule or order to be made in pursuance of this Act be directed."

Section 104. "That before notice of any adjudication of bankruptcy shall be given in the London Gazette, and at or before the time of putting in execution any warrant of seizure which shall have been granted upon such adjudication, a duplicate of such adjudication shall be served on the person adjudged bankrupt, personally, or by leaving the same at the usual or last known place of abode or place of business of such person, and such person shall be allowed seven days, or such extended time, not exceeding fourteen days in the whole, as the Court shall think fit, from the service of such duplicate, to show cause to the Court against the validity of such adjudication; and if such person shall within such time show to the satisfaction of the Court that the petitioning creditor's debt, trading, and act of bankruptcy upon which such adjudication has been grounded, or any or either of such matters, are insufficient to support such adjudication, and upon such showing no other creditor's debt, trading, and act of bankruptcy sufficient to support such adjudication, or such of the said last-mentioned matters as shall be requisite to support such adjudication in lieu of the petitioning creditor's debt, trading, and act of bankruptcy, or any or either of such matters, which shall be deemed insufficient in that behalf, as the case may be, shall be proved to the satisfaction of the Court, the Court shall thereupon order (in the form contained in schedule U to this Act annexed, or to the like effect) such adjudication to be annulled, and the same shall by such order be annulled accordingly; but if at the expiration of the said time no cause shall have been shown to the satisfaction of the Court for the annulling of such adjudication, the Court shall forthwith, after the expiration of such time, cause notice of such adjudication to be given in the London Gazette, and shall thereby appoint two public sittings of the Court for the bankrupt to surrender and conform, the last of which sittings shall be on a day not less than thirty days and not exceeding sixty days from such advertisement, and shall be the day limited for such surrender: Provided always, that the Court shall have power from time to time to enlarge the time for the bankrupt surrendering himself for such time as the Court shall think fit, so as every such order be made six days at least before the day on which such bankrupt was to surrender himself: Provided also, that if any person so adjudged bankrupt shall, before the expiration of the time allowed for showing cause, surrender himself, and give his consent, testified in

* 217 * *Mr. Swanston* and *Mr. W. W. Cooper*, in support of the appeal. — If an appeal with a view to annul the decision of the commissioner were allowed to be made to himself after the expiration of the period prescribed by the 104th section of the Act, it would amount to an entire * evasion of the provisions of that section, as the bankrupt would thus be enabled to extend the time beyond the twenty-one days limited by the 12th section for appealing to the Vice-Chancellor from decisions of the commissioner. The Act clearly defines the powers of the commissioners; they have the power of adjudication, and they have also power under the 104th section to review such adjudication, but this must be within seven or fourteen days, as the case may be; and it is to be observed that this was an extension of the period of five days given to a bankrupt to dispute the bankruptcy under the 23d section of the Act 5 & 6 Vict. c. 122. It is clear that before the passing of the Consolidation Act the commissioners had no power to annul, and as that Act has not specifically conferred such a power it cannot be implied. The Court of Review had such powers, but they were expressly conferred on it by the Act 1 & 2 Will. 4, c. 56, and when the jurisdiction of that Court

writing under his hand, to such adjudication being advertised, the Court, after such consent so given, shall forthwith cause the notice of adjudication to be advertised, and appoint the sittings for the bankrupt to surrender and conform."

Section 238. "That if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication), within twenty-one days after the advertisement of the bankruptcy in the London Gazette, or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the *fiat*, or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the Gazette containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such *fiat*, or before the date and filing of the petition for adjudication, and that such *fiat* was sued forth, or such petition filed, on the day on which the same is stated in the Gazette to bear date."

Section 276 enacts, that the term "the Court," and the term the "Court of Bankruptcy," shall mean her Majesty's Court of Bankruptcy, and shall mean also and include any commissioner or commissioners of her Majesty's Court of Bankruptcy constituting and acting as a Court under the Act.

was transferred to one of the Vice-Chancellors in Bankruptcy by the Act 10 & 11 Vict. c. 102, and subsequently to the Lords Justices by the 7th section of the Act 14 & 15 Vict. c. 88, their respective powers were clearly defined, and there is no expression in either of these Acts referring to any such powers in the commissioners. With respect to the merits upon which it may be attempted to repeat the argument which was used before the Vice-Chancellor, it is not disputed that a creditor, after taking his debtor in execution, cannot sue for the same debt: *Cohen v. Cunningham*, (a) but it is submitted, that as the bankrupt has obtained his discharge and assented to the advertisement of the adjudication, having refrained from disputing it within the period prescribed under the 104th section, he has elected to be bound by it and cannot now dispute it. In this respect the present * case differs from *Ex parte Gould*, (b) where the bankrupt * 219 had obtained no advantage. It is further submitted that the Vice-Chancellor's judgment was wrong in ordering the present appellants to pay the costs.

[THE LORD CHANCELLOR referred to the cases of *Goldie v. Gunston*, (c) and *Watson v. Wace*. (d)]

Mr. Daniel, contra. — Under the circumstances set forth in the special case the petitioning creditor's debt on which this adjudication was based is clearly invalid. The 104th section of the Act is perfectly distinct from and ought not to be construed with the 12th and 233d sections; its only object is to prevent any injury to the bankrupt from the publication of the adjudication in the Gazette. The language of the 12th section is quite comprehensive enough to give the commissioner jurisdiction; if not, the adjudication cannot be reviewed by any tribunal, for the only jurisdiction which can be exercised by the Vice-Chancellor under the Act is appellate, and an application to review an *ex parte* order like the present is an original application; it is therefore submitted that it is a proceeding within the meaning of the 233d section, *Ex parte Thorold*. (e) It is also to be observed, that by the 12th section the jurisdiction to review the adjudication is conferred on "the

(a) 8 T. R. 123.

(d) 5 B. & C. 153.

(b) 1 De G. 29.

(e) 3 Mont. D. & De G. 285.

(c) 4 Camp. 381.

Court," which by the interpretation clause of the Consolidation Act is defined to mean and include not only her Majesty's Court of Bankruptcy but also any commissioner thereof constituting and acting as a Court under the Act.

Mr. Swanston, in reply.

* 220 * THE LORD CHANCELLOR. — The real question in this case is, whether the petition presented to the commissioner on the 19th March, 1851, was, or not, a proceeding before the proper tribunal, with the view of annulling the previous adjudication of the commissioner, within the meaning of the Statute 12 & 13 Vict. c. 106. After that Act became law there was an end of *fiats*, and the only matter which was the foundation of a bankruptcy was the adjudication. The adjudication then is not, as the old commission was, merely a ministerial act on the part of the commissioner, but is a public proceeding and a judicial act of the commissioner, whose decision both as to the law and fact is founded upon the evidence before him. As, however, that proceeding is *ex parte* and might sometimes be found to work unjustly, a remedy is given to the trader enabling him, before any thing final can be done, to come and show cause against the validity of the adjudication; and accordingly by the 104th section the trader is to have notice by a service of the duplicate of the adjudication; but if after such service the trader fails to show to the satisfaction of the commissioner sufficient grounds for annulling the adjudication within seven or fourteen days, as the case may be, the Court shall forthwith cause notice of such adjudication to be given in the Gazette.

It appears, that by the 12th section very extensive powers are conferred on the commissioner, but inasmuch as it was not intended that his decision should be final, it is provided that an appeal shall in all cases lie to one of the Vice-Chancellors; the word "Court" at the beginning of the section obviously meaning the commissioner. There is no doubt that the petition for adjudication was a matter over which the commissioner had jurisdiction, and

* 221 this section, therefore, in defining * the jurisdiction, states "that the Court (that is, the commissioner) shall have superintendence and control over all matters of bankruptcy," but "subject in all cases to an appeal to such one of the Vice-Chancellors

of the High Court of Chancery, as the Lord Chancellor shall from time to time be pleased to appoint to sit in bankruptcy;" this shows that no such evil would arise as that the party would be without remedy by the adjudication of the commissioner.

It must be borne in mind, that it had invariably been the object of the legislature, in all previous statutes relating to bankrupts, to limit the period within which a bankrupt might appear to set aside a commission. It had been ascertained that the expense of attempts to set aside commissions was enormous, and that such attempts were productive of nothing short of the dissipation of the bankrupt's estate, and the total ruin of the bankrupt himself. The legislature has therefore attempted by various steps, and by different courses of proceedings, to determine the validity of the bankruptcy at the earliest possible period. The present statute follows the same course, and with that view provides, by the 104th section, that the bankrupt shall have the power of contesting within seven or fourteen days the first judicial act which the commissioner has power to perform; and by the 12th section it gives the power of appealing in all cases to such one of the Vice-Chancellors as may have been appointed, but this must be done within twenty-one days. The first step then is by way of showing cause before the commissioner, the next by way of appeal to the Vice-Chancellor. If however the bankrupt does not take either of these proceedings within the prescribed periods, the next step which the Act of Parliament has directed, is to be found in the 233d section, which, with the same object, provides that if the bankrupt shall not, if he were * within the United * 222 Kingdom at the date of the adjudication, within twenty-one days after the advertisement of the bankruptcy in the London Gazette, have commenced an action, suit, or other proceeding to dispute or annul the *fiat* or the petition for adjudication, the Gazette containing such advertisement shall be conclusive evidence of the bankruptcy.

The general object of the statute being to procure an early decision as to the validity of the bankruptcy, what has the bankrupt done in the present case? He has not contested the validity of the adjudication within the period prescribed under the 104th section, but after the expiration of that period, and within twenty-one days after the advertisement of the bankruptcy, he has applied to the commissioner to annul the adjudication. It has been con-

tended, on the part of the creditors, that when the commissioner has heard all the evidence and has once pronounced his decision, he has done all he has power to do, and that the only mode of disputing that decision, if found fault with, is by way of appeal; that whenever a proceeding by way of appeal is to be resorted to, the Act of Parliament must be consulted for the mode of regulating such appeal; and that when appellate jurisdiction is given by the Act, it is expressly given to one of the Vice-Chancellors. On the part of the bankrupt, it has been urged that the application was an original application, the effect of this being in fact to extend the period for appealing beyond the twenty-one days limited by the 12th section, and to enlarge the period of showing cause under the 104th section, from within seven or fourteen days, as the case may be, to twenty-one days.

It is quite clear that the bankrupt had the power to question the propriety of the adjudication, but it is equally clear that the * 223 application to the commissioner * ought to have been within the time prescribed under the 104th section. It appears to me that it was not intended by the Act to enable the commissioner to review his own judgment, except within the period prescribed by the 104th section; and that therefore the petition of appeal in this case was not presented to a competent tribunal, and that it ought to have been presented to the Vice-Chancellor.

I think therefore that the judgment of the commissioner was correct, in holding that the party was wrong in applying to him after the expiration of the time appointed for showing cause; and that the order of the Vice-Chancellor cannot be sustained.

* 224

* *Ex parte* WILLIAM STANTON.

In the Matter of WILLIAM STANTON, a Bankrupt.

1851. December 20. Before the Lord Chancellor Lord TRURO, and the LORDS JUSTICES.

The commissioner may on the occasion referred to in the 256th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), refuse to grant the bankrupt further protection on other grounds than for one of the offences specified in that section.

The term "further protection" in the 257th section is not exclusively referable to

cases in which further protection has been refused, on account of the commission of any of the offences specified in the 256th section; and the certificate in the form contained in the schedule B a to the Act, and mentioned in the 257th section, may be granted where further protection has been refused on other grounds than for one of the offences enumerated in the 256th section.

The words "this enactment," in the 259th section, are not referable to the whole Act, but to that particular section only.

THIS was a motion on the part of William Stanton, the bankrupt, to reverse the decision of Mr. Commissioner Evans, refusing to set aside a certificate signed by him in this matter on the 13th October, 1851, under the 257th section of the Bankrupt Law Consolidation Act, 1849, whereby he certified that the assignees of the bankrupt were creditors of the bankrupt, as such assignees, for the sum of 1207*l.* 12*s.* 5*d.*, in trust for the creditors of the bankrupt, and that the bankrupt was not protected by the Court from process against his person, and also refusing to discharge the bankrupt out of custody. The motion further sought to set aside the said certificate and the execution issued thereon; and that the bankrupt might be discharged from custody on the ground that the certificate and execution were irregular and invalid, and not warranted by the proceedings in the case or otherwise; and that the assignees might be ordered to pay the costs of the application made to the commissioner and of the present application.

The bankrupt had carried on the business of a watchmaker, jeweller, and stationer at Buckingham, and had been declared a bankrupt on his own petition on the 5th of December, 1850. Having duly * surrendered on the 14th of January, 1851, his * 225 examination had been adjourned by the commissioner until the 20th of February, 1851, on the ground that he had not filed any stock account or proper cash account with his balance sheet. On the 20th of February, 1851, the examination was resumed, and was again adjourned for the same cause, and with protection until the 27th of March, 1851.

The bankrupt was subsequently, on the 13th of October, 1851, served with a summons to appear before the commissioner to show cause why he had not filed a stock or cash account; and the bankrupt having duly appeared before the commissioner on the day named, declared that the reason why he had not filed a stock and cash account as required by his assignees was, that "he was

not able to furnish such account ; " whereupon the commissioner, by a memorandum in writing, certified that the bankrupt being examined had not filed a cash account and stock account as required by his assignees, and therefore he, the commissioner, refused the bankrupt further protection. On the same day the commissioner also granted a certificate under the seal of the Court, in the form contained in the schedule B a to the 12 & 13 Vict. c. 106, to the effect that the assignees of the bankrupt were creditors of the bankrupt for the sum of 1207*l.* 12*s.* 5*d.*, in trust for the creditors of the bankrupt, and that the bankrupt was not protected from process against his person. On the 21st October, 1851, the bankrupt was arrested and committed to prison, by virtue of a writ of execution issued on such certificate, and on the 20th November applied to the commissioner to set aside the last-mentioned certificate, on the ground that it was not warranted by the proceedings and proof in the case, and also to be discharged out of custody. This application having been refused by the

* 226 commissioner, the bankrupt * appealed to the Lords Justices. The motion came on to be heard before their Lordships on the 3d and 13th December, but no judgment was upon either of these occasions delivered by their Lordships, and it was ultimately arranged that the motion should be heard before the Lord Chancellor and the Lords Justices.

The questions involved in the case depended mainly upon the construction of the 256th, 257th, and 259th sections of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), and were: first, whether it was competent for the commissioner to have refused further protection, except for one of the offences enumerated in the 256th section ; and, secondly, whether the commissioner had the power to grant the certificate in the form mentioned in schedule B a under the 257th section, except in a case where further protection had been refused in respect of one of the offences specified in the 256th section.*

* The following are the sections of the Act above referred to. The offences annexed to the 256th section are not, however, set forth, as it was admitted by the counsel for the assignees that the bankrupt had not been guilty of any of such offences.

Section 256. " That if at the sitting appointed for the last examination of any bankrupt, or at any adjournment thereof, it shall appear to the Court that the

* On the opening of the motion a preliminary objection * 227
 was taken on behalf of the assignees that the application
 was too late ; that the appeal was in reality from the * order * 228
 of the 13th October, 1851, and that the three weeks limited

bankrupt has committed any of the offences hereinafter enumerated, the Court shall refuse to grant the bankrupt any further protection from arrest ; and if, at any sitting or adjourned sitting for the allowance of the certificate of any bankrupt, it shall appear that he has committed any of such offences, the Court shall refuse to grant such certificate, or shall suspend the same for such time as it shall think fit, and shall in like manner refuse to grant the bankrupt any further protection."

Section 257. " That the assignees for the time being of the estate and effects of any bankrupt, when the accounts relating to his estate shall have become records of the Court, shall be deemed judgment creditors of such bankrupt for the total amount of the debts which shall by such accounts appear to be due from him to his creditors ; and every creditor of any bankrupt, immediately after the proof of his debt shall have been admitted, shall be deemed a judgment creditor of such bankrupt to the extent of such proof ; and the Court, when it shall have refused to grant the bankrupt any further protection or shall have refused or suspended his certificate, shall, on the application of such assignees or of any such creditor, grant a certificate under the seal of the Court in the form contained in schedule Ba to this Act annexed, and every such certificate shall have the effect of a judgment entered up in one of her Majesty's superior Courts of Common Law at Westminster until the allowance of the certificate of conformity of such bankrupt ; and the assignees or the creditor to whom, according to such certificate, the bankrupt shall be indebted as therein mentioned, shall be thereupon entitled to issue and enforce a writ of execution against the body of such bankrupt ; and the production of any such certificate to the proper officer of any such superior Court shall be sufficient authority to him to issue and seal such writ, and it shall be lawful for such superior Courts to make such orders and rules in that behalf as to them shall seem fit : Provided always, that every such last-mentioned certificate shall be deemed to have been cancelled and discharged by the allowance of the certificate of conformity of such bankrupt from the time of such allowance : Provided also, that no execution, by virtue of any certificate which shall be granted to any creditor or assignees as aforesaid shall be issued, nor shall any such certificate or execution in any manner affect any estate or effects which shall come to or be acquired by the bankrupt, after the allowance of his certificate of conformity."

Section 259. " That if any bankrupt shall be taken in execution after the refusal of protection, or after the refusal or suspension of his certificate, he shall not be discharged from such execution, until he shall have been in prison for the full period of one year, except by order of the Court : Provided always, that this enactment shall not take effect until after the expiration of six months from the commencement of this Act, and then only against such persons as shall have been adjudged bankrupt under this Act, and for offences committed after the commencement of this Act."

to the bankrupt for appealing by the 12th section of the Act had expired. Against this, it was contended that it was the order of the 24th November, 1851, that formed the subject of the appeal, and that therefore the objection did not apply.

[Their Lordships, without positively deciding upon the objection, permitted the argument to proceed.]

Mr. C. P. Cooper and Mr. Simpson, for the bankrupt. — The term “protection” is used in the Bankrupt Law Consolidation Act, 1849, in a double sense; it is used, first, in reference to discretionary protection in the ordinary acceptation of the word before the statute; and, secondly, in a new sense with reference to the provisions of the Act, commencing with the 255th section and ending at the 259th, the 256th section enumerating certain specific offences for which such protection must be refused. The protection referred to in the 256th section can only be refused if the bankrupt is proved to have been guilty of one of the nine offences there stated; and the certificate in the form in schedule B a, mentioned in the 257th section, can only be issued in cases where the bankrupt has been refused further protection under the 256th section: the bankrupt in the present case has not committed any one of such offences. Before the passing of the Act, creditors who had proved could not have arrested the bankrupt, but now by means of the certificate consequent upon the refusal of further protection, they are enabled to do so under the 256th section, which therefore clearly confers a new and additional benefit on creditors. The 259th section also shows that the protection referred to in that and the previous sections is different from the protection existing under the law as it formerly stood, for

* 229 the penalty *there indicated can only take effect six months after the passing of the Act, and for offences committed after the commencement of the Act. The sections in question are highly penal, and ought to be construed strictly in favour of liberty.

Mr. J. Russell and Mr. Sturgeon, contra. — The fallacy on which the bankrupt is proceeding lies in assuming that the certificate in question can be granted only when protection has been refused for one of the nine offences specified in the 256th section. The form

of the certificate itself shows that it is based on the single fact of protection having been refused ; if it was intended that it should only issue when protection had been refused for one of the offences in respect of which the commissioner has no discretion or power to grant protection, it would necessarily have been so stated in the form. Besides, the expression in the 257th section, "when the Court shall have refused to grant further protection," is obviously more referable to a case where the granting or withholding protection is in the discretion of the commissioner, than to cases in which he can have no alternative but to refuse protection.

Mr. Simpson, in reply.

THE LORD CHANCELLOR, after recapitulating the facts of the case, said : There are two questions involved in the consideration of this matter : first, whether the commissioner is authorized to refuse protection where a bankrupt has not been found guilty of one or other of the offences specified in the 256th section of the Act ; and, secondly, supposing that the commissioner can refuse protection for other causes, would a refusal for any other cause warrant him in granting a certificate in the form * contained in the * 230 schedule Ba under the 257th section. I am of opinion that the commissioner came to a correct conclusion ; I think that he had the power of refusing protection on other grounds than for one of the offences specified in the 256th section, and that he was fully justified in granting the certificate ; and that the bankrupt is in legal custody for evasion of the provisions of the statute.

His Lordship then referred to the 12th, 112th, 113th, 160th, 162d, 198th, and 199th sections of the Act, and after observing on the large discretionary powers conferred by them on the commissioner to grant or withhold protection, proceeded : In this case the commissioner exercised the power of protecting the bankrupt from arrest under the 162d section for a period of several months. The discretionary powers to which I have adverted are not confined to any particular case, but are very general ; and it is to be observed that they are in derogation of the common-law process to which the bankrupt would be amenable at the suit of his creditors, and which, but for this Act of Parliament, any creditor might enforce. The Act, after stating various circumstances under which protection may be given or withheld, enumerates, in the 256th

section, certain specific offences with reference to which the refusal of protection is not discretionary, but imperative on the commissioner. Then comes the 257th section, which, as it appears to me, was intended to embrace the whole Act. All that falls within or without the commissioner's discretion having been previously stated, it enacts that when the state of the accounts relating to the bankrupt's estate shall have become matters of record, the assignees shall become judgment creditors for the amount due by the bankrupt; and if the commissioner refuses protection,

* 231 it is not in his power to withhold the * grant of the certificate which by the express terms of the section is to have the force of a judgment.

Now when it is considered that all the common-law remedies are taken away, there being no mode of punishment except through the operation of the Act, I really see no reason why the section in question should have a limited application; and when in cases like the present a bankrupt has not made that full disclosure which the commissioner was of opinion he ought to have made, I think it very reasonable that the commissioner should withhold protection in order that the creditors may have the power to enforce their rights, otherwise the bankrupt, who was refused protection for any other offence than one under the 256th section, might escape punishment altogether, and the creditors would be deprived of all remedy. On the whole, therefore, it appears to me that there is no ambiguity in the 257th section, and that it is more reasonable to apply it to all cases in which the commissioner has power to refuse protection than to those only in which the bankrupt may have been guilty of one or other of the nine offences specified in the 256th section.

Then with respect to the 259th section, upon which reliance has been placed, it is true that the latter part of it professes only to apply to persons who have been adjudged bankrupt under the Act, and at a certain period, and for offences committed after the commencement of the Act; but it must be borne in mind that, with reference to old bankruptcies, it is expressly provided by the 4th section, that they are to be continued under the Act except when otherwise provided for. I do not think, therefore, that the proviso in the 259th section limits the application of the preceding sections to bankruptcies occurring after the passing of the Act. It

* 232 appears to * me that the words "this enactment," do not

confine the previous part of the section to any particular portions of the Act, but that they apply only to the particular section itself.

THE LORD JUSTICE LORD CRANWORTH.—I entirely concur in the opinion expressed by the Lord Chancellor. The question is, whether the commissioner was justified in refusing further protection: for if this was the case, he was bound to grant the certificate, it being clear upon the construction of section 257, that in all cases where the commissioner is authorized to refuse further protection and does so, the certificate issues upon the application of the assignees as of course. In the present case the commissioner had refused further protection, and the assignees applied for the certificate, so that the very case mentioned in the 257th section had occurred. But then it is said that although that is the literal construction of the words of the Act, yet that when one reads that section with the other sections there is enough upon the Act of Parliament to satisfy the Court that the *primâ facie* meaning of these words is not to be followed. I cannot arrive at that conclusion. The argument upon that point was of this nature, that the legislature has declared by the 256th section, that whenever a bankrupt shall have committed any one of the offences enumerated in that section, the commissioner shall be bound to refuse the bankrupt any further protection, and to refuse or suspend his certificate of conformity; and that when, therefore, the legislature in the next section says that when the Court shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate of conformity, it shall grant the certificate set out in schedule B a, it must be taken to refer only to cases in which such refusal or suspension took place on account of the commission of one of the previously enumerated * of- * 233 fences, particularly when it is considered that this Act of Parliament was divided into groups of clauses, and that this particular group related solely to offences. I confess that argument never had much weight with me. There is no rule more safe than to construe Acts of Parliament according to the plain meaning of the words used, unless a manifest absurdity results therefrom. If we look to the other sections of the Act, they will be found not to support the interpretation, which would cut down the generality of the 257th section. For example, the 201st section provides, “that

no bankrupt shall be entitled to a certificate of conformity if the bankrupt shall have lost by any sort of gaming 20*l.*, or 200*l.* by stock-jobbing." According to the argument to which I am addressing myself, these offences not being enumerated in the list in the 256th would not be within the 257th, whereas it seems that this would be exactly the case where it would be the duty of the commissioner to refuse further protection, and to issue the certificate in the form set out in schedule Ba.

But then it is said, in consequence of an observation which fell from Lord Justice KNIGHT BRUCE, that because the 257th section speaks of the refusal of "further" protection, and the 256th section is the only other section where the word "further" occurs, the legislature, in the 257th, refers only to the refusal of "further" protection mentioned in the 256th, where this particular adjunct "further" occurs. But I do not think that this peculiarity of phrase controls the general enactment, for although the expression "further protection" does not occur in the previous sections, yet in the 162d section it is enacted, that if at the last examination *sine die*, the bankrupt shall be free from arrest for such time (if any) as the commissioner should think fit to in-
 * 234 dorse * upon the summons. Now, if the commissioner does not indorse any time upon the summons, that is substantially refusing "further" protection.

Moreover, the 257th section says that the commissioner shall issue the certificate for judgment where he has previously refused or suspended the certificate of conformity. Now in section 198, which relates to the granting of the certificate of conformity, power is given to the commissioner to refuse or suspend the allowance thereof, as the justice of the case may require, and, as I have said, the 201st section renders it incumbent on him to refuse it in some cases which are not comprehended in section 256.

These were the arguments raised on the 256th and 257th sections, but the main argument has been rested on the 259th section; and though, as the Lord Chancellor has observed, there is a degree of ambiguity about it, yet I think I see my way to a rational construction, and that the objection raised upon it cannot control the construction of the two previous sections. I construe the words "this enactment" as if they had been "this clause." Can the words "this enactment" refer to the whole of the enactments

in this group? If so, it would amount to a legislative declaration of impunity for all offences against the bankrupt law there specified which might be committed for six months. This appears to me an unanswerable argument.

Another argument founded on these words was, that they might mean all that was new in the present Act. But it appears to me a fallacy to speak of one part of the Act being more new than another. The whole is new. All the previous Acts were repealed with the exceptions mentioned in the schedule. For these reasons I can only construe the 259th section by itself.

* THE LORD JUSTICE KNIGHT BRUCE. — As a majority of * 235 the Court have agreed upon a particular construction of this Act of Parliament, it would be of no importance were I to say that I dissent from them; and considering the great and obvious ambiguities which unfortunately pervade the statute in so many instances, it would not be matter for wonder had I dissented from the other members of the Court. But to say that I dissent would be to represent not quite accurately the condition of my mind. I only doubt.

The grounds for this doubt, or a part of the grounds for it, I will state in a few words. I find sections 256, 257, 258, and 259 standing together. They are wholly new in this sense, that there were no provisions similar to them in the law of this country previously. But there are in the same statute immediately preceding and immediately following this new matter, enactments which, with a very slight variation, were the law of England before, and for that reason, though not alone for that reason, it may perhaps be considered that the four sections containing the new matter ought to be regarded as one entire and undivided provision, of which every part is dependent upon the rest, and to be construed with the rest.

The 256th section provides that in certain cases the Court, without exercising any option or discretion whatever, shall refuse any further protection to the bankrupt, or refuse or suspend the certificate of conformity. It then proceeds to enumerate with particularity the cases in which the Court is so to refuse protection, or refuse or suspend the certificate. These are not the only punishable offences against the bankrupt law, but they are offences placed beyond the discretion of the commissioner. Then the 257th

* 236 section provides that when *the Court shall have refused further protection, or refused or suspended the certificate of conformity, the Court “shall” (not “may”) grant a certificate of judgment. My doubt upon this and other grounds is, whether these clauses, which leave no discretion to the commissioner, are not to be taken together, and whether the commissioner could grant a certificate of judgment except in a case where it was obligatory upon him to refuse protection, or to refuse or suspend the certificate of conformity.

It is not necessary for me to enter into the matter further. I make these remarks by way of apology for doubts which probably I shall ever entertain; but I say again that to represent the state of my mind as one of absolute dissent, would be inaccurate.

* 237

* *Ex parte* HOLTHOUSE.¹

In the Matter of HOLTHOUSE.

1851. November 5, 11. Before the LORDS JUSTICES.

A creditor who has not been permitted to oppose the certificate before the commissioner, on the ground of his having omitted to give the requisite notice of his intention to oppose, cannot be heard in support of the commissioner's decision, refusing the certificate and protection, on an appeal from that decision. The bankrupt's certificate will be altogether refused if it appear that he has systematically bought on credit to sell at less than cost price.²

THIS was the appeal of the bankrupt from the refusal of his certificate of conformity.

It was admitted that he had been in the habit of buying goods on credit, and, selling them at less than the cost price.

Mr. Cooke in support of the appeal.—Although the misconduct with which the bankrupt is charged was grave, still, as it is not among the offences specified in the Bankrupt Law Consolidation Act, 1849, § 256, it ought not to be visited with the most

¹ S. C., 21 L. J. Bank. 3.² See *Ex parte* Rufford, 2 De G., M. & G. 234; *Ex parte* Manico, 3 De G., M. & G. 502; *Ex parte* Nicholson, 1 De G., F. & J. 270; *Ex parte* Coleman, 3 De G. & J. 43.

severe punishment which that Act has annexed to the greatest of the specified offences. The commissioner did not decide the case on the ground that it was within the 256th section of the Bankrupt Law Consolidation Act. It was contended before him that the conduct of the bankrupt might be held to be equivalent to obtaining goods on "false pretences," or by some "manner of fraud." But he considered that this class of offences only included cases where goods had been obtained by means of some false representations.

Mr. Malins and *Mr. Cracknall*, for the assignees, were not called upon.

THE LORD JUSTICE LORD CRANWORTH. — It would be difficult to frame a definition of fraud * which would not include * 238 such conduct as that of systematically buying goods on credit for the purpose of selling them under cost price. If a certificate is ever to be altogether withheld, there could hardly be a clearer case than this for taking such a course.

The Lord Justice KNIGHT BRUCE concurred.

Mr. Malins, in answer to a question from the Court, said that the assignees consented to protection being granted to the bankrupt, who was advanced in years.

Mr. Cooke referred to the terms of the 256th section, and suggested a question as to the power of the Court to grant protection when it refused the certificate. He submitted that the best way of accomplishing the object which all had in view, was by granting a certificate qualified in such a manner as to protect the bankrupt's person only.

The Court declined acceding to this proposition, but said that they would, upon the assignees' consent, grant protection, if the bankrupt desired it.

The order was that the petition should be dismissed, so far as it prayed for the allowance of the certificate; and the assignees by their counsel consenting thereto, the Court, until further order, granted protection to the bankrupt from arrest or imprisonment.

November 11.

On this day,

Mr. Rolt and *Mr. Bagley* on behalf of Messrs. Travers & Son, who were creditors of the bankrupt, moved that the order might be discharged, or varied, so far as it granted protection to the bankrupt.

* 239 * *Mr. Cooke*, for the bankrupt, objected, that these creditors had not entitled themselves to oppose the certificate before the commissioner, who declined hearing them, as they had not given the requisite three days' notice for that purpose, according to the 198th section of the Act.

Mr. Rolt and *Mr. Bagley* submitted that it was competent for any creditor to support the commissioner's order. They contended that proceedings on appeal were not within the 198th section, and that the requisition as to notice did not apply to them.

THE LORD JUSTICE LORD CRANWORTH. — Upon general principles, rather than the specific provisions of the Act, I think that these creditors cannot be heard. The legislature only allows creditors to be heard against the allowance of the certificate who have given three clear days' notice to the registrar of their intention to oppose. *A fortiori*, they cannot be heard to oppose in this Court without having given such notice.

THE LORD JUSTICE KNIGHT BRUCE. — I am of the same opinion.

The objection was allowed, and the motion refused, with costs.

1851. December 12. Before the LORDS JUSTICES.

A. having a reversionary interest in personalty, which he had mortgaged first to B. and then to C., agreed to sell it to D., and D. having at A.'s request paid off B. out of the purchase-money, A. agreed that, until the sale should be completed, D. should stand in the place of B., and have the benefit of B.'s security. In the memorandum in which the agreement was expressed, there

was a recital that the payment had been made to B. out of the purchase-money and in discharge of her debt. *Held*, that B.'s debt was not extinguished, but that D. was entitled to the benefit of B.'s security.

The rules as to tacking one mortgage to another apply to foreclosure as well as redemption suits,¹ and to mortgages of equitable personalty, by way of trusts for sale, as well as to ordinary mortgages of real estate.²

On an appeal from part of a decree, the whole case is open to the respondents.³

THIS was an appeal from a decree of the late Vice-Chancellor of England. The facts are fully detailed in the 16th volume of Mr. Simons's Reports, page 640, and may be thus shortly stated:—

In November, 1844, the defendant Symes assigned to Mrs. Severne, by way of mortgage, a reversionary interest to which he was entitled in certain residuary personal estate vested in the trustees of a will.

In May, 1845, he assigned the same interest, subject to the above security, to the plaintiff Watts, to secure 400*l.*, the security being in the form of an assignment upon trust for sale, and for payment of the residue to Symes after the payment of the 400*l.* and interest.

¹ But see 1 Washb. Real Estate (1st ed.), 541, and cases cited in note (1).

² As to the doctrine of tacking one mortgage to another in case of real estate, see 1 Story Eq. Jur. §§ 412–421; 4 Kent (11th ed.), 176 *et seq.*; 1 Lead. Cas. in Eq. (3d Am. ed.), 594 [494] *et seq.* and notes to case of *Marsh v. Lee*; 1 Dan. Ch. Pr. (4th Am. ed.) 213. In the United States the doctrine of tacking mortgages so as to affect mesne incumbrances duly registered is very generally exploded, as against the policy of the Registry Acts. See 4 Kent (11 ed.), 178; 1 Washb. Real Estate (1st ed.), 540, 541; 1 Story Eq. Jur. § 419, note; *Grant v. Bissett*, 1 Caines Cas. 112; *Osborn v. Carr*, 12 Conn. 195; *Brazee v. Lancaster Bank*, 14 Ohio, 318; *Frost v. Beekman*, 1 John. Ch. 298, 299; *Parkist v. Alexander*, 1 John. Ch. 394; *Green v. Tanner*, 8 Met. 411, 423; *Loring v. Cook*, 3 Pick. 48; *St. Andrews Church v. Tomkins*, 7 John. Ch. 14; *Averill v. Guthrie*, 8 Dana, 82; *McKinstry v. Merwin*, 3 John. Ch. 466; *Burnet v. Denniston*, 5 John. Ch. 35; *Anderson v. Neff*, 11 S. & R. 208; *Thomas's Appeal*, 6 Casey, 378; *Townsend v. The Empire Stone Dressing Co.*, 6 Duer, 208. The same is true in other countries where Registry Acts exist. 4 Kent (11th ed.), 178; *Latouche v. Lord Dunsaney*, 1 Sch. & Lef. 137, 157, 430. As to tacking in cases of personal property, see 2 Story Eq. Jur. § 1034; *Jarvis v. Rogers*, 15 Mass. 389; *Townsend v. The Empire Stone Dressing Co.*, 6 Duer, 208; 2 Kent (11th ed.), 584; in cases exclusively between the mortgagor and mortgagee; *HOFFMAN, J.*, in *Townsend v. The Empire Stone Dressing Co.*, 6 Duer, 208.

³ 2 Dan. Ch. Pr. (4th Am. ed.) 1489; *Sherwin v. Shakespear*, 5 De G., M. & G. 523; *Terhune v. Colton*, 1 Beasley (N. J.), 312, 318; *Consequa v. Fanning*, 3 John. Ch. 587.

In July, 1846, he agreed to sell the reversionary interest to one of the defendants, named Tanner.

Before the sale was completed, Mrs. Severne required to be paid off, and Tanner, at the request of Symes, paid to her the amount of her mortgage debt and interest. There was a conflict of testimony as to whether Tanner had, upon the payment, stipulated for a transfer of her mortgage to him or for the benefit of the security.

* 241 * On the 30th July, 1846, Symes signed a memorandum, acknowledging that Tanner had agreed to purchase the reversionary interest for 1500*l.*, and had, at Symes's request, paid Mrs. Severne 1200*l.* in discharge of her mortgage out of the 1500*l.* By the same memorandum, Symes agreed to execute an assignment of the reversionary interest, and declared that, until the assignment was executed, Tanner should stand in Mrs. Severne's place, and have the full benefit of her mortgage security.

No assignment had yet been executed.

When the second mortgage to Watts was made, he was already mortgagee of other property, which Symes had conveyed to him to secure another debt of 200*l.*

By the present suit he sought to foreclose Symes and Tanner, in default of their paying to him all that was due on both of his securities.

Tanner insisted that he was entitled to the benefit of Mrs. Severne's security, and that, at all events, he was entitled to redeem the plaintiff by only paying what was due in respect of the mortgage of the reversionary interest.

The Vice-Chancellor decided against him upon the former of these contentions, and in his favour upon the latter, declaring, by the decree, that the charge of the 1500*l.* was extinguished; but that, on payment of the 400*l.*, Tanner was entitled to redeem the plaintiff's mortgage or the reversionary interest.

The plaintiff appealed from so much of the decree as
* 242 * declared that Tanner was entitled to redeem one of the mortgages only.

Mr. Roll and *Mr. Shapter* supported the appeal.

Mr. Stuart and *Mr. Dickinson*, for the defendant Tanner, claimed to have the whole case opened, and to be at liberty to dispute the portion of the decree from which there was no appeal.

Mr. Rolt and *Mr. Shapter* contended that this could not be done without a cross appeal.

The Court held that the respondents might open the whole decree. (a)

Mr. Rolt and *Mr. Shapter*, for the plaintiff. — First, as to the alleged extinguishment of the 1500*l.* Upon the whole evidence it must be taken that there was not any contract on the part of *Mr. Tanner* for a transfer of *Mrs. Severne's* security. Without such a contract he had no right to require it to be transferred. *Dunstan v. Patterson.* (b)

[Lord Justice KNIGHT BRUCE said that in the case referred to, the decision had been misunderstood, and consequently misrepresented. He believed, indeed, that the decree had been drawn up in a manner not warranted by any thing that he had directed or said.]

In *Toulmin v. Steere*, (c) an annuitant took a charge subject to a prior mortgage. Subsequently, a second * mort- * 248 gage was created, and the second mortgagee took a transfer of the first mortgage, and afterwards joined with the persons interested in the equity of redemption, except the annuitant, in conveying to trustees, who bought under the direction of the Court. Sir W. GRANT held that the mortgages were extinguished. The same point had been already decided in *Greswold v. Marsham*, (d) *Mocatta v. Murgatroyd.* (e)

This is substantially the same case. *Mr. Tanner* has the benefit of the redemption as the owner of the property, and cannot stand as mortgagee upon his own estate. He has purchased on an undertaking to pay the mortgage debt, which thus became a debt from himself.

[THE LORD JUSTICE LORD CRANWORTH. — Can you make out that *Mr. Tanner* is a purchaser, except by a memorandum, which stipulates for the benefit of the existing security ?]

(a) See *Rawlins v. Powell*, 1 P. W. 299.

(b) 2 Phil. 341; and see note, p. 342.

(c) 3 Mer. 210.

(d) 2 Ch. Ca. 170.

(e) 1 P. W. 393.

[THE LORD JUSTICE KNIGHT BRUCE. — How can you avail yourself of one part of the contract without adopting the other?]

We submit that it was not one contract, but that the 1500*l.* was paid off without any stipulation that it should be kept alive, and this brings the case within the authority of *Toulmin v. Steere*, and the subsequent cases in which that authority has been acted upon; such as, *Medley v. Horton*, (a) *Brown v. Stead*, (b) *Farrow v. Rees*, (c) *Wade v. Coope*. (d) As the subject of the

* 244 *security was an equitable share in a reversionary interest, there was no legal estate which could be kept on foot.

THE LORD JUSTICE KNIGHT BRUCE. — It is plain that a person who borrows money cannot be his own creditor, or set up an incumbrance of his own against his creditor. But *Toulmin v. Steere*¹ carried the proposition a step further, and applied the same rule to a man who acquired an equity of redemption as to the original mortgagor. That decision proceeded upon two previous decisions. The language of Sir W. GRANT is this: "The cases of *Greswold v. Marsham* (e) and *Mocatta v. Murgatroyd* (g) are express authorities to show that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in against subsequent incumbrancers." With the greatest deference to the authority of that eminent Judge, I always doubted and still doubt whether the cases mentioned by him go that length. In this case the payment and the agreement that Mr. Tanner should have the benefit of Mrs. Severne's security appear to us, on a reasonable view of the acts of the parties, to have been substantially one transaction. We do not think that there is any room for doubt as to what was Mr. Tanner's intention. And whether it was enforceable at law, or in equity only, is immaterial for the purpose of the present argument. Mr. Tanner made the payment with the intention of standing in the place of Mrs. Severne. She became in effect a trustee for him. As the purchase has not yet been completed, the time has not arrived at which the extinguishment could take place. We think

(a) 14 Sim. 222.

(d) 2 Sim. 155.

(b) 5 Sim. 535.

(e) 2 Ch. Ca. 170.

(c) 4 Beav. 18.

(g) 1 P. W. 393.

¹ 3 Mer. 210; see *Otter v. Lord Vaux*, 6 De G., M. & G., 638.

that Mr. Tanner having paid his money to Mrs. Severne is
 * entitled to stand in her place in the particular circum- * 245
 stances of the case.

The Lord Justice Lord CRANWORTH concurred, and their Lordships consequently desired to hear the counsel for the respondents only on the question respecting their claim to redeem one of the mortgages, without redeeming the other.

Mr. Stuart and Mr. Dickinson, for the respondents. — This is a suit, not for redemption, but for foreclosure; and the rule that a mortgagor must redeem his mortgagee wholly is founded entirely upon the principle that he who seeks equity must do equity completely. The principle does not apply where the mortgagee is the plaintiff, and insists upon his legal right merely, and the mortgagor is not seeking the interposition of the Court (*a*). This distinction was acted upon in a recent case of *Holmes v. Turner*, (*b*) which was followed by Sir G. TURNER in a case of *Smeathman v. Bray*. (*c*) In all the cases which may be referred to as supporting a contrary view, there was an actual legal estate in the mortgagee, so that the interposition of the Court was required to restore the property to the mortgagor, whereas in this case there was a mere assignment of an equitable interest, upon trust for sale, with an express trust for payment of the residue of the purchase-moneys to the respondent Symes, after payment of the 400*l.* and interest only, although the other mortgage debt existed at the time.

They referred to *Jones v. Smith*. (*d*)

* *Mr. Shapter*, during the argument, said that he was * 246
 counsel in *Holmes v. Turner*, and that the point in question
 was not argued there.

Mr. Teed and Mr. Martindale appeared for other parties.

Mr. Rolt was not called upon to reply on this part of the case.

THE LORD JUSTICE KNIGHT BRUCE. — The respondents are entitled to the 1200*l.*, secured by Mrs. Severne's mortgage; but if

(*a*) See *Ex parte Berridge*, 3 M. D. & D. 467.

(*b*) 7 Hare, 367, n.

(*c*) 15 Jur. 1051.

(*d*) 2 Ves. Jr. 372.

they desire to have the property they must redeem both the appellant's mortgages.

THE LORD JUSTICE LORD CRANWORTH.—I am of the same opinion. I thought it quite settled that whether the suit was for foreclosure or redemption, the mortgagee was equally entitled to say to the mortgagor, You must redeem entirely or not at all. That is the general rule, and I have looked in vain in the deed in this case for any thing special.

1851. December 12, 22. Before the LORDS JUSTICES.

Where a testator directs his trustees to invest trust moneys in parliamentary stocks or funds, or on real securities, and they omit so to invest it, the *cestui que trustent* have not the option of charging them with the moneys which would have been produced if the moneys had been invested in the funds, but are only entitled to have the trust moneys replaced, with interest at 4l. per cent.¹

It is not necessarily a breach of trust under such a will to continue in their actual state of investment part of the assets, consisting of turnpike bonds.²

THIS was an appeal from a decision of the late Master of the Rolls, reported in the 11th volume of Mr. Beavan's Reports, p. 371.

¹ 1 Jarman Wills (3d Eng. ed.), 575 and note (d); 3 Lead. Cas. in Eq. (3d Am. ed.) [749], [750] 454, 473, 474; Knott v. Cottee, 16 Beav. 77, 80; Aspland v. Watte, 20 Beav. 474; Lewin Trusts (5th Eng. ed.), 271, 272; Brown v. Gellatley, L. R. 2 Ch. Ap. 751; Baynard v. Woolley, 20 Beav. 583; Baud v. Fardell, 7 De G., M. & G. 628. Hill Trustees (3d Am. ed.) 537 *et seq.* and notes, where the subject of investment is discussed at length and the cases cited: Barney v. Saunders, 16 How. (U. S.) 535. Where money is bequeathed to a trustee, "to be invested and improved according to his best skill and judgment," it is his duty to invest in safe securities, and his discretion in the selection of investments is not enlarged by the words, "according to his best skill and judgment." Kimball v. Reding, 31 N. H. 352. A direction to invest in "bank stocks, or freehold lands or lots," will not authorize investment in the United States loan. Banister v. McKenzie, 6 Munf. 447.

² See Smith v. Smith, 4 John. Ch. 281; Harvard College v. Amory, 9 Pick. 462; Thompson v. Brown, 4 John. Ch. 628.

Matthew Robinson, the testator in the cause, by his will dated the 10th of January, 1835, gave all the residue of his personal estate to his executors, upon trust that they should, with all convenient speed, collect and convert the same into money, and should place out and invest the net amount thereof, or continue the same in or upon any of the parliamentary stocks or funds, or on real securities, at interest, and should pay the interest and dividends of the said stocks, funds, and securities to his son Augustin Robinson, for his life; and after his decease then upon trust to pay and transfer the said stocks, funds, and securities to, between, and among the children of the said Augustin Robinson.

The testator died on the 20th of July, 1837, and in the following month of August the will was proved by the executors.

The present bill was filed by the three infant children of Augustin Robinson against the executors, and against their father, for the purpose of having their grandfather's estate administered. The cause was heard on the 29th of May, 1847, when a decree was made directing the usual accounts, and by the decree inquiries were directed *as to the securities upon which * 248 the trust property had been invested.

The Master, by his report, after setting out the state of the accounts, found that the testator's personal estate consisted at his death of two sums in the 3l. per cents, and also of the following particulars: 5468l. bank stock, 5182l. London Dock stock, 6000l. turnpike bonds, due from the trustees of the Surrey and Sussex roads, and 5000l. Surrey and Kent sewers bonds.

It appeared that these several funds constituted the whole net residue, after payment of debts and legacies. And the executors paid over the interest and dividends on the whole of them to Mr. Augustin Robinson from the testator's death (subject to the exceptions mentioned below with respect to the road bonds), until the month of July, 1845. In that month the executors sold the bank stock for 11,511l., and the London Dock stock for 6063l., and they immediately invested these sums in the purchase of 3l. per cents. In the following month of August, 1845, they sold the sewers bonds at par; namely, for 5000l., and that sum also they invested in the 3l. per cents.

The sums which they obtained on the sales of these three funds were in each case greater than they could have obtained if they had sold them at the end of one year from the testator's death; i.e.,

on the 20th of July, 1838. But the 3*l.* per cents were higher in July, 1845, than they had been in July, 1838; and in the case of the bank stock and the sewers bonds, the excess of price obtained was not sufficient to compensate the rise in the price of the 3*l.* per cents purchased, so that a less sum of 3*l.* per cents was * 249 realized than would have been produced * if the investment had been made in July, 1838; that is to say, 289*l.* 3*l.* per cents less in respect of the bank stock, and 225*l.* 3*l.* per cents less in respect of the sewers bonds. In the case of the London Dock stock not only was the money produced in 1845 greatly more than would have arisen from a sale in 1838, but the amount of 3*l.* per cents purchased from that produce exceeded by 2704*l.* 3*l.* per cents what would have been produced if the stock had been sold and the 3*l.* per cents purchased in 1838. It also appeared that the trustees of the turnpike road had paid to the executors 1500*l.* in part discharge of the 6000*l.* secured by the turnpike bonds, and that the executors had duly applied the 1500*l.* so paid off. The other 4500*l.* they permitted to continue upon the security of the bonds, and had paid the interest thereupon to the tenant for life.

The bonds were in the usual form, being instruments under the hands of seven of the trustees, whereby, in pursuance of the Turnpike Acts, they assigned such proportion of the tolls, toll-gates, and other the property of the trustees, as the sum advanced bore to the whole amount to be raised under the Acts, to be holden during the continuance of the Acts, unless the amount advanced, with interest at 5*l.* per cent per annum, should be sooner repaid and satisfied.

The cause came on to be heard on further directions before Lord LANGDALE on the 13th of March, 1849, when a decree was made declaring that the produce arising from the sale of the London Dock stock and sewers bonds ought to have been invested in 3*l.* per cents, and that the turnpike bonds ought to have been sold, and the proceeds similarly invested; and charging * 250 the executors with the amount of stock which * might have been thus purchased. It also declared that the defendant, Augustin Robinson, was entitled to so much of the income arising from those funds, from the end of one year after the testator's death, as should not exceed the dividends on the 3*l.* per cents which ought to have been purchased, if they had been so purchased.

Against this part of the decree Augustin Robinson, the tenant for life, and the executors, severally appealed, on the ground that the decree was erroneous in charging the executors with the amount of 3*l.* per cents which might have been thus realized at the end of the year ; and so in declaring that the tenant for life was entitled to no more than the amount of the dividends which would have arisen from such 3*l.* per cents in case they had been purchased.

Mr. Walpole and *Mr. Kent*, for the appellant, *Mr. Augustin Robinson*, cited and commented upon *Rees v. Williams*, (a) *Marsh v. Hunter*, (b) *Hockley v. Bantock*, (c) *Watts v. Girdlestone*, (d) *Ames v. Parkinson*, (e) *Ouseley v. Anstruther*, (g) *Caldecott v. Caldecott*, (h) *Sutherland v. Cooke*, (i) *Shepherd v. Moulds*, (k) *Attorney-General v. Jones*, (l) and contended that no case had established the doctrine, that where the trustees had the option of selecting out of several descriptions of investment, according to the terms of the power, the *cestuis que trustent* could at any time afterwards hold them responsible for not having selected that which, as it happened, would have been the most profitable ; that * if this could be established, trustees, among whose * 251 powers was one to invest in railway shares, might be ruined for not having embarked the trust funds in those speculations. They also insisted that even if the *cestuis que trustent* could exercise such an option after the investment, they must be unanimous in exercising it ; and that in this case the tenant for life, who was one of them, did not concur in electing 3*l.* per cents, but preferred the real securities on which part of the assets had been allowed to continue invested.

Mr. Roundell Palmer and *Mr. Elmsley*, for the executors. — This is a case in which there is a conflict of authority. On the one side there is the authority of Sir J. LEACH, (m) Sir J. L. KNIGHT BRUCE, (n) and Sir J. WIGRAM ; (o) and on the other, that of Lord GIFFORD, (p) and Lord LANGDALE. (q) We submit that the

(a) 1 De G. & S. 314.

(b) 6 Madd. 295.

(c) 1 Russ. 141.

(d) 6 Beav. 188.

(e) 7 Beav. 379.

(g) 10 Beav. 456.

(h) 1 Y. & C. C. C. 312, 737.

(q) 3 Beav. 317 ; 6 Beav. 188 ; 7 Beav. 379 ; 10 Beav. 456 ; 11 Beav. 371.

(i) 1 Coll. 498.

(k) 4 Hare, 500.

(l) 1 Mac. & G. 574.

(m) 6 Madd. 295.

(n) 1 De G. & S. 314.

(o) 4 Hare, 500.

(p) 1 Russ. 141.

law, as laid down by the three Judges whom we have first mentioned, is that which ought to prevail, and that the reasoning on which Lord LANGDALE proceeded, following Lord GIFFORD's decision in *Hockley v. Bantock*, is inconclusive. That reasoning is founded on the rule adopted in the case of employment of trust moneys in trade, where there is no trust for that purpose, or in other unauthorized modes. In such cases, no doubt, the *cestui que trust* has the option of taking the fund with the profits actually made, or with those which would have arisen from a proper mode of investment. That rule, however, has no application as between two modes of investment, both of which are equally proper.

* 252 * They referred to *Buxton v. Buxton*. (a)

Mr. Roll and *Mr. Dickinson*, for the infant children.—The turnpike bonds ought to have been converted. Even admitting them to be real securities, all real securities do not afford proper investment. *Stickney v. Sewell*. (b) Trustees must select such a security as this Court would approve of in executing the trusts of a will which authorized an investment on real security. Any security upon which this Court would not, in such a case, order an investment to be made is one not within the scope of the trust. A mere speculation in real securities is unjustifiable. In *Buxton v. Buxton*, (c) and the cases belonging to the same class, the question was as to the selection of the time for conversion into a proper state of investment, not as to a total omission to convert, such as has occurred in the present case. A second mortgage is a real security; but trustees would not be justified in allowing trust moneys to remain upon such an investment. The tenant for life was entitled not to the actual income yielded by the property, but only to such sums as he would have been entitled to receive, if the conversion had taken place.

[THE LORD JUSTICE KNIGHT BRUCE.—Is there not a difference between trustees allowing money to remain upon such security, and themselves advancing it? According to the argument, if a trustee found part of the assets invested upon a second mortgage at 5l. per cent, he would be bound to call it in. Has any case gone to that extent?]

(a) 1 M. & C. 80.

(b) 1 M. & C. 8.

(c) 1 M. & C. 80.

* The principle on which several of the decisions applicable to this part of the case proceed would justify the contention. But it is not necessary for us to put the case so high. The turnpike securities are limited to the time during which the Turnpike Acts are in force; that is, to a term of years only. The investment, therefore, was like an investment upon the security of leaseholds, upon which, according to all the authorities, the executors and trustees would not be justified in allowing the assets to continue.

They referred to and commented upon *Mills v. Mills*, (a) *Dimes v. Scott*, (b) *Gibson v. Bott*. (c)

Mr. Druce appeared for an after-born child in the same interest with the plaintiffs.

Mr. Kent, in reply.

December 22.

The Lord Justice Lord CRANWORTH, after stating the facts of the case, in nearly the same words as those in which they are above expressed, proceeded as follows:—

The executors contend that they are chargeable only with the money which the securities in question, if sold at the end of a year from the testator's decease, would then have produced, and with interest thereon at 4*l.* per cent, and so that, as the securities in fact produced more than could have been obtained for them in 1838, the plaintiffs have no demand against them. The tenant for life contends that he is entitled to have credit from July, 1838, to July, 1845, not for the amount of the dividends which would have been produced from the 3*l.* * per cents, if purchased, but for interest at 4*l.* per cent on the sums which the securities, if sold in July, 1838, would then have produced, not exceeding, of course, the amount of dividend or interest actually realized. The case was very fully argued before us a few days since, and as there has been a difference of opinion in different branches of the Court on the subject of the duties and liabilities of executors, and the rights of a tenant for life in cases like the present, we desired a short time to look into those authorities before we came to a decision.

In the present case it will be observed the executors had the

(a) 7 Sim. 501.

(b) 4 Russ. 195.

(c) 7 Ves. 89.

option of investing the trust money at their discretion on real or government securities, and in such a case Sir J. LEACH held, in the case of *Marsh v. Hunter*, (a) that trustees, by whose default the money is lost, are chargeable, not with the amount of stock which might have been purchased, but only with the principal money lost, and of course, though the report is not so expressed, with interest thereon.

That decision occurred in 1822. Four years later, namely, in 1826, occurred the case of *Hockley v. Bantock*, (b) before Lord GIFFORD. There the executors had a similar discretion of investing either on real or government securities; and, on a bill seeking to charge them with balances improperly retained in their hands, Lord GIFFORD directed an inquiry as to the price of 3*l.* per cents at the several times when the balances ought to have been invested. Such an inquiry would have been improper if the executors could not have been charged with the value of the stock; and

the case, therefore, is an authority that, in the opinion of * 255 Lord * GIFFORD, they might be so charged. Notwithstanding this last case, however, Sir J. LEACH adhered to his own view of the law, and acted on it in an unreported case of *Gale v. Pitt* at the Rolls on the 10th of May, 1830.

Lord GIFFORD's authority has been followed by Lord LANGDALE in several reported cases, to which we were referred in the argument; namely, *Watts v. Girdlestone*, (c) *Ames v. Parkinson*, (d) and *Ouseley v. Anstruther*. (e)

On the other hand, Sir JAMES WIGRAM, in *Shepherd v. Moulds*, (g) and my learned brother in *Rees v. Williams*, (h) have refused to follow the authority of *Hockley v. Bantock*, (i) and have acted on the earlier case of *Marsh v. Hunter*. (k) In this irreconcilable conflict of authority, it is absolutely necessary for us to look to the principles on which the doctrine rests.

There can be no doubt but that, where trustees improperly retain balances in their hands, or, by want of due care, cause or permit trust money to be lost, they are chargeable with the sums so retained or lost, and with interest on them at 4*l.* per cent.

(a) 6 Madd. 295.

(b) 1 Russ. 141.

(c) 6 Beav. 188.

(d) 7 Beav. 379.

(e) 10 Beav. 456.

(g) 4 Hare, 500.

(h) 1 De G. & S. 314.

(i) 1 Russ. 141.

(k) 6 Madd. 295.

It may also be true that, where trustees have in their hands, money which they are bound to secure permanently for the benefit of their *cestuis que trustent*, then in the absence of express authority or direction to the contrary, they are generally bound to invest the money in the 3l. per cents. This obligation is not the result of any positive law, but has been imposed on trustees * by the Court as a convenient rule, affording security to * 256 the *cestuis que trustent*, and presenting no possible difficulty to the trustees.

Suppose, then, that trustees have improperly retained in their hands balances which they ought to have invested in 3l. per cents, either by reason of this general rule of the Court, or because such a duty was expressly imposed on them by the terms of the trust, or have by neglect allowed such balances to be lost, what, in such a case, is the right of the *cestuis que trustent*?

In all such cases, or at all events, in all such cases where there has been an express trust to invest in 3l. per cents, the *cestuis que trustent* have the option of charging the trustee either with the principal sum retained and interest, or with the amount of 3l. per cents which would have arisen from the investment if properly made. The doctrine of the Court where it applies this rule is, that the trustee shall not profit by his own wrong. If he had done what he was bound to do, a certain amount of 3l. per cents would have been forthcoming for the *cestuis que trustent*. And therefore if called on to have such 3l. per cents forthcoming, he is bound to do so; just as, in ordinary cases, every wrong-doer is bound to put the party injured, so far as the nature of the case allows, in the same situation in which he would have stood if the wrong had not been done. All this is very intelligible.¹

Again, suppose the trustee has not only improperly retained balances, but has lent or used them in trade. There the *cestui que trust* has the right, if it is for his interest to do so, to charge the trustee not with the sum retained and interest, but with all the profits made in the trade.

* The ground on which this right rests is this. The em- * 257 ployment in trade is unwarrantable; but if it turns out to have been profitable, the *cestui que trust* has a right to follow the money, as it is said, into the trade. In such a case, the trade prof-

¹ See *Barney v. Saunders*, 16 How. (U. S.) 535.

its have in fact been produced by the employment of the money of the *cestui que trust*; and it would be manifestly unjust to permit the trustee to rely on his own misconduct in having exposed the funds to the risks of trade, as a reason for retaining the extra profits beyond interest for his own benefit. Even where no such extra profits have been made, the *cestui que trust* is in general at liberty to charge his trustee, who has allowed the trust money to be employed in trade, with interest at 5l. per cent, that being the ordinary rate of interest paid on capital in trade.¹ This right depends on principles the same, or nearly the same, as those which enable the *cestui que trust* to adopt the investment, and take the profits actually made.

But the grounds on which, in all these cases, the right of election in the *cestui que trust* rests, wholly fail in a case where a trustee, having an option to invest either in 3l. per cents, or on real security, neglects his duty and carelessly leaves the trust funds in some other state of investment. In such a case, the *cestui que trust* cannot say to the trustee: If you had done your duty I should now have had a certain sum of 3l. per cents, or the trust fund would now consist of a certain amount of 3l. per cents. It is obvious that the trustee might have duly discharged his duty, and yet no such result need have ensued.

Where a man is bound by covenants to do one of two things, and does neither, there in an action by the covenantee, the
 * 258 measure of damage is in general the * loss arising by reason of the covenantor having failed to do that which is least, not that which is most, beneficial to the covenantee; and the same principle may be applied by analogy to the case of a trustee failing to invest in either of two modes equally lawful by the terms of the trust.

It was contended at the bar that, in such a case, the trustee has by his neglect lost his right of electing between the two modes of investment; that he was always bound by the trust to exercise his discretion in the mode most beneficial for the objects of the trust;

¹ See *Lewin Trusts* (5th Eng. ed.), 227, 276-278; *Williams v. Powell*, 15 Beav. 461; *Schieffelin v. Stewart*, 1 John. Ch. 620; 2 Story Eq. Jur. § 1277; *Myers v. Myers*, 2 M'Cord, 214, 266; *Diffenderfer v. Winder*, 3 Har. & G. 311. Per WELLS, J., in *Marsh v. Renton*, 99 Mass. 135; *Trull v. Trull*, 13 Allen, 407; *Blauvelt v. Ackerman*, 5 C. E. Green (N. J.), 148, 149; *Hill Trustees* (3d Am. ed.), 548 and note; *Staats v. Bergen*, 2 C. E. Green (N. J.), 554, 562, 563.

and that having omitted to do so at the time when the option was open to him, he can no longer do it when he is called to account for his neglect, and when he can no longer exercise an unbiassed and impartial option. The fallacy of this argument consists in assuming that, in the case supposed, the trustee is called on to exercise any option at all. He is not called on to exercise an option retrospectively; but is made responsible for not having exercised it at the proper time, for not having made one of two several kinds of investment. And a reason for his being in such case chargeable only with the money which should have been invested, and not with the 3*l.* per cents which might have been purchased, is, that there never was any right in the *cestui que trust* to compel the purchase of 3*l.* per cents. The trustee is answerable for not having done what he was bound to do, and the measure of his responsibility should be what the *cestui que trust* must have been entitled to, in whatever mode that duty was performed.

The ground on which Lord LANGDALE proceeded in the several cases before him appears to have been that when the trustee has failed to discharge his duty in either of the ways which were open to him, the *cestuis que trustent* * may then exercise an * 259 option which certainly did not belong to them by the terms of the trust; i.e., that if the trustee has failed to exercise his option, then the right of election passes to the *cestuis que trustent*, although not given to them by the instrument creating the trust. But on what foundation does this supposed right of the *cestuis que trustent* to exercise such an option rest? No such right can be derived from the principle that the *cestuis que trustent* are entitled to compel the trustee to do what he was bound to do, for he was not bound to purchase 3*l.* per cents. Nor from the principle that they may follow the trust funds into their actual state of investment, or charge a higher rate of interest in consequence of such investment, for the foundation of the complaint is, that the funds have not been invested at all. The only plausible foundation for the doctrine which occurs to us is this: The trustee was bound to exercise his option not capriciously, but in the mode likely to be most beneficial to the *cestuis que trustent*. And their interests appear in the result to be best served by requiring an investment in 3*l.* per cents. But this reasoning seems founded on a fallacy. The selection of the 3*l.* per cents is thus made to depend not on any option in their favour which the trustee was originally bound

to exercise ; but on the accident of their subsequent rise in value, a principle of decision from which, with all deference, we differ. If such a principle were to be applied, then, as it was well put at the bar, if in the present case there had been a discretion to invest in railway shares, the *cestuis que trustent* might perhaps now fix on the shares of some particular railway which have risen very highly in value, and say the investment might have been, and so ought to have been, on that particular security.

On the whole, therefore, we cannot discover any such right of option as is contended for in the *cestuis que trustent*,
 * 260 * not on the ground of their being entitled by the terms of the trust to compel the trustee to make an investment in 3l. per cents, for no such obligation was imposed on him ; not on the ground of their being entitled to adopt or insist on any actual investment, for no investment was made ; not on the ground of any obligation on the part of the trustees to select the 3l. per cents as the most beneficial mode of investment, for the advantage of the 3l. per cents arises from their accidental and subsequent rise in value, and not from any necessary superiority at the time when the investment ought to have been made.

The consequence is, that the decree should, we think, be varied by striking out so much of it as declares that the produce arising from the sale of the bank stock, London Dock stock, and sewers bonds ought to have been invested in 3l. per cents, and that the defendant Augustin Robinson was entitled to so much only of the income arising from those funds from the end of one year after the testator's decease, as should not exceed the amount of the dividends which would have accrued due on the 3l. per cents, if purchased ; and it must be declared that he is entitled from the end of the first year after the testator's decease up to the time of the sales and investments in 3l. per cents in July and August, 1845, to interest at 4l. per cent on the amount which the Master has found that those funds would have produced at the end of the year, not exceeding the amount of interest and dividends actually produced.

This disposes of the questions as to the bank stock, London Dock stock, and sewers bonds. But before we quit this part of the subject, we think it right by way of caution to remark that our decision does not at all go to exonerate a trustee who,
 * 261 by the express terms of his * trust, is bound to invest in

3l. per cents, but who has retained balances in his hands, from the obligation to account for those balances with interest, instead of making good the amount of 3l. per cents, whenever the 3l. per cents have fallen instead of risen in value. In such a case the same principle applies which authorizes the *cestui que trust* to adopt any investment in trade or otherwise which has been actually made. He may insist on having the 3l. per cents, for, *ex hypothesi*, it was the duty of the trustee so to invest the trust moneys. But he may, on the other hand, if no such investment has been made, treat the money as being according to the fact in the hands of the trustee, to be accounted for by him. No such question arises in the present case; and we only advert to it now because an argument, apparently founded on such a possible state of things, was glanced at by counsel.

It remains to consider the question as to the turnpike road bonds. The Master finds that the testator was at his death possessed of 6000l. due from the trustees of the Surrey and Sussex roads, secured by a mortgage of or charge upon the tolls and toll-houses which the said trustees were by Act of Parliament authorized to make. Of this sum 1000l. was paid off by the trustees to the executors on the 2d day of December, 1837, and was by the executors duly applied as part of the testator's assets. The interest of the remaining 5000l. was regularly paid to the tenant for life up to the 26th of November, 1846, when a further sum of 500l., part of the 5000l., was paid off and was invested by the executors in the purchase of 3l. per cents, so that a sum of 4500l. only now remains secured on these road securities. Lord LANGDALE's order puts these road bonds, as they have been (not very accurately) designated in the argument, on precisely the same footing with the bank stock, London * Dock stock, and * 262 sewers bonds, and treats the 5000l. road bonds, which were in the hands of the executors at the end of a year from the testator's decease, as assets left by them improperly invested, and as to which therefore the executors ought to be charged with the amount of 3l. per cents, which, if then sold, they would have produced.

If these securities are not real securities within the meaning of that expression contained in the will, then, of course, the same rule must be applied to them as to the other securities sold in July and August, 1845. But we think that these road bonds, as

they have been called, are real securities, on which, by the terms of the will, the executors were justified in leaving the testator's assets invested. There can be no doubt that they are real securities, indeed they are so perhaps even more emphatically than an ordinary mortgage. The security is merely a security on the tolls and toll-houses; *i.e.*, on certain corporeal and certain incorporeal hereditaments. They give no personal right against any one. The remedy of the mortgagee or bondholder is merely against the real property, made subject to the charge; and if the testator had given to any one by way of specific legacy, all such real securities as he should die possessed of or entitled to, we consider it perfectly clear these turnpike securities would have passed. The question then is, whether the executors were justified in leaving these securities as they found them; that is to say, in treating them as being not improper investments, to be continued under the authority given by the will.

We think they were. There is nothing to fetter the discretion of the executors; they were at liberty to continue any part of the assets which they might find invested on real security, on

* 263 the same security on which they * might find it. The 5000*l*.

in question was invested on what we consider to be a real security, permanent in its nature, and approved by the testator. To hold that it was a breach of duty in the executors to leave that sum as they found it would, as we think, be to deprive them of a discretion given to them by the testator, without any sufficient warrant for our so doing.

Circumstances connected with the great social changes resulting from the formation of railways may now have made these turnpike mortgages ineligible as a security on which longer to leave the assets invested. And we think it reasonable that the Master should inquire whether it may not be expedient that they should now be called in. But in the mean time we do not feel warranted in treating them as securities which the executors were bound to realize.

The order, therefore, must, as to these mortgages, be varied by declaring, if necessary, that they were real securities on which the executors were justified in leaving the assets of the testator invested; and the interest on which, therefore, has been properly paid to the tenant for life.

We desire not to be understood as giving any opinion on the

point (not arising in the present case), whether the executors would have been justified in laying out any part of the general assets on turnpike securities similar to those now in question.¹

It appears that, in order to cover the deficiency in the 3*l.* per cents produced by the investments in 1845 of the money produced by sale of the bank stock and sewers bonds, Mr. Augustin Robinson, the tenant for life, has purchased, in the names of the executors, two sums of *289*l.* 3*l.* per cents, and 225*l.* 3*l.* *264 per cents; and he has, in like manner, purchased in their names a sum of 1213*l.* 3*l.* per cents, to meet the excess of his receipts, as income beyond what he would have been entitled to, by way of dividends on the 3*l.* per cents, if purchased at the end of the first year. An account must be taken of what Mr. Augustin Robinson ought to have received as interest at 4*l.* per cent on the value of the bank stock, London Dock stock, and sewers bonds at the end of the year from the testator's decease, and he must pay into Court the excess of his receipts from the dividends and interest of these funds beyond the amount of such 4*l.* per cent.

The three sums of 289*l.*, 225*l.*, and 1213*l.* 3*l.* per cents will stand as a security for what shall be found due from him in respect of that excess; and on his paying into Court what, if any thing, shall be found due from him on taking the account, these sums of stock must be retransferred to him.

This disposes of the whole case.

¹ It has since been determined, that a power to lend on real securities does not authorize a loan upon railway mortgages: *Mant v. Leith*, 15 Beav. 525; *Harris v. Harris*, 29 Beav. 107; and *a fortiori* a power to invest "upon the security by way of mortgage of any freehold, copyhold, or leasehold hereditaments," does not authorize an investment on railway mortgages. *Mortimore v. Mortimore*, 4 De G. & J. 472; *Lewin Trusts* (5th Eng. ed.), 264. If a trustee's authority enables him to invest in stocks, they should appear to have been at the time productive, and to have had a market value depending upon their income, and not upon contingencies. Shares in a contemplated railroad are not such stocks. *Kimball v. Reding*, 31 N. H. 352. This case is instructive in regard to investments. See also upon the same subject, *Harvard College v. Amory*, 9 Pick. 446; *Lovell v. Minot*, 20 Pick. 116; *King v. Talbot*, 50 Barb. (N. Y.) 453; 2 Story Eq. Jur. §§ 1269, 1269 *a*; *Worrell's Appeal*, 9 Barr, 508; *Twaddell's Appeal*, 5 Barr, 15; *Smith v. Smith*, 4 John. Ch. 281, 445; *Swoyer's Appeal*, 5 Barr, 377; *Hill Trustees* (3d Am. ed.), 537 *et seq.*, and notes and cases cited; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Murray v. Feinour*, 2 Md. Ch. 419; *Evans v. Inglehart*, 6 Gill & J. 192; *Barney v. Saunders*, 16 How. (U. S.) 535.

* 265 * In the Matter of the Trusts of the Settlement of W. A.
DALTON and HARRIET his Wife,

AND

In the Matter of the Act 10 & 11 Vict. c. 96.

1852. January 13. Before the Lord Chancellor Lord TRURO.

By marriage settlement a sum of stock was vested in trustees, upon trust to pay the dividends to the husband and wife and the survivor during life, upon the condition that they should, during the minorities of their children, find and provide them with suitable diet, clothing, and general maintenance and support, in proportion to the circumstances and condition in life of the husband and wife, and to the expectancies of the children: the husband subsequently presented a petition under the Insolvent Debtors Protection Act, upon which an official assignee was appointed, and an order for protection granted on the terms of his paying 30*l.* a year out of the dividends of the settled estate, in discharge of his debts: the husband and wife afterwards assigned all their interest in the trust fund to R. O., an assignee for valuable consideration. The trustees having paid the fund into Court under the provisions of the Trustees Relief Act, the infant children presented a petition asking that the dividends of the whole trust fund might be applied for their maintenance and support, the amount being not more than sufficient for that purpose: this petition was opposed by R. O. The Lord Chancellor, however, made the order, holding that under the terms of the settlement the children were entitled; but without deciding what he would have done if it had been shown that the money borrowed from R. O. had been directly for the benefit of the children, and without determining what was the effect on the interest of the husband of the order for protection.

Held, also, that the question raised was a matter which it was competent for the Court to deal with on petition under the Trustees Relief Act.

THIS was an appeal from an order of the Vice-Chancellor KNIGHT BRUCE, made upon the petition of the infant children of Mr. and Mrs. Dalton, and dated the 13th June, 1850, directing that the dividends of a sum of 4232*l.* 16*s.* bank three per cent annuities, forming the subject of the marriage settlement of Mr. and Mrs. Dalton, should during the minority of the petitioners be applied for their maintenance and support. The following are the facts which led to the original petition and to the present appeal.

By indenture of settlement, dated the 29th July, 1839, a fund, represented by that dealt with by the order appealed from,
* 266 was vested in trustees upon trust, among * other things, that they, the trustees, during the joint lives of Mr. Dalton

and his wife, should pay the interest, dividends, and annual produce of the trust moneys and securities into the hands of Mr. Dalton and his wife, or upon their joint receipt or acquittance for the same; and from and after the decease of either of them, then to pay the said interest, dividends, and annual produce to the survivor of them for his or her life, but without any power of anticipating the said interest, dividends, or annual produce, or any part thereof; and subject to the aforesaid trusts, it was declared and agreed that the trustees should stand possessed of one equal moiety of the trust moneys and the interest, dividends, and annual produce thereof, in trust after the decease of either of them, Mr. and Mrs. Dalton, to pay over such moiety unto the survivor of them for his or her own absolute use and benefit, and as to the remaining moiety of the trust moneys and premises in trust for the child, or, if more than one, for such child or children of the marriage as Mr. and Mrs. Dalton should, during their joint lives by any deed or deeds jointly appoint, but so nevertheless that no share in the capital should be absolutely vested in any child being a son until twenty-one, or being a daughter until twenty-one or marriage, and in default of such appointment, and so far as the same should not extend, in trust for all the children of the marriage equally in manner therein directed: and it was by the indenture also declared that it should be lawful for the trustees at any time during the lives of Mr. and Mrs. Dalton or the survivor of them, or after their decease, at the discretion of the trustees, to apply all or any part of the share or presumptive share to which any child might be entitled, for or towards the education, preferment, advancement, or benefit of such child.

And it was agreed and declared to be the true intent * and meaning of the indenture and of the parties thereto, * 267 that the dividends, income, and annual produce of the said trust moneys and premises respectively were thereby "reserved and secured to the said W. A. Dalton and Harriet his wife and the survivor of them, upon the condition only that they, the said W. A. Dalton and Harriet his wife, and the survivor of them, should from time to time and at all times during the minorities or minority of all and every the child or children of them the said W. A. Dalton and Harriet his wife, find and provide such child or children with suitable diet, clothing, and general maintenance and support, in proportion to the circumstances and condition in life

of them the said W. A. Dalton and Harriet his wife, and to the expectancy or expectancies of such child or children respectively, notwithstanding the portion or portions of such child or children should not have become vested or payable ;” and it was provided that from and after any such advance should have been so made in the lifetime of Mr. and Mrs. Dalton, amounting either alone or in the whole to one-third part of the share or shares respectively, then and in such case and from thenceforth Mr. and Mrs. Dalton and each of them should be wholly released and discharged from the condition or obligation contracted by the indenture to find and provide such child or children with diet, clothing, or maintenance as aforesaid.

And it was by the indenture also declared that the trustees should, after the decease of the survivor of Mr. and Mrs. Dalton, pay and apply for the maintenance and education of any child the interest, dividends, and annual produce of the portion to which such child should for the time being be entitled in presumption or expectancy, and invest the remainder of the interest, dividends,

and annual produce to accumulate : and it was further declared that on failure of issue of the marriage, or in default of any child becoming entitled under the provisions of the settlement, the trustees should on the death of the survivor of Mr. and Mrs. Dalton stand possessed of the moiety of the said trust moneys and premises and the interest, dividends, and annual produce thereof, or such part or parts thereof respectively as should not have become vested or been applied or appointed under any of the trusts or provisions contained in the settlement, in trust for Mr. Dalton absolutely.

In August, 1844, Mrs. Dalton having been taken in execution for the sum of 67*l.* for the debt and costs of an action brought by the indorsee of certain joint and several promissory notes made by herself and her husband, applied to the Court of Bankruptcy for protection, and W. Whitmore was appointed official assignee, and T. S. Selway was appointed creditors’ assignee under the insolvency. In November, 1844, the commissioner made an order for the protection of Mrs. Dalton, upon the condition of the payment of the claim for which she had been so taken in execution by the yearly sum of 40*l.* by half-yearly payments out of the funds settled by the indenture.

In November, 1844, Mr. Dalton having been taken in execution,

petitioned the Court of Bankruptcy for protection, and E. Edwards was appointed official assignee under the insolvency. In February, 1845, the commissioner made an order for the protection of Mr. Dalton, directing that a proposal made by him for the payment of his debts should be carried into effect; namely, that Mr. Dalton should pay to the official assignee 30*l.* in each year until his debts were discharged by half-yearly payments of 15*l.* each.

In December, 1845, Mr. and Mrs. Dalton assigned unto Robert Obbard all the dividends, interest, and * annual * 269 proceeds to which they were entitled during their joint lives in the capital sum of 4232*l.* 16*s.* consolidated three per cent annuities, being the fund then subject to the trusts of the settlement, and also all that one moiety of the capital itself and the dividends, interest, and annual proceeds thereof to which Mr. Dalton would become absolutely entitled by virtue of the settlement in the event of his surviving his wife, and also all that the other full and equal moiety or half part of the capital sum and the dividends, interest, and annual proceeds thereof, to which Mr. Dalton would become entitled in the event of his surviving his wife and there not being any child who should become entitled thereto by virtue of the settlement, and also a certain life policy of assurance, upon the trusts therein mentioned for securing to R. Obbard the sum of 500*l.* lent by him to Mr. and Mrs. Dalton.

It appeared that the trustees had never in any manner recognized the order of November, 1844, in reference to Mrs. Dalton; but that upon obtaining the joint authority of Mr. and Mrs. Dalton, they had from time to time paid to the official assignee the half-yearly instalment of 15*l.*, according to the order made on Mr. Dalton's petition, and had handed the balance of the dividends to Mr. and Mrs. Dalton on their joint acquittance.

In July, 1849, the trustees were served with a notice on the part of R. Obbard that the sum of 500*l.* and a considerable arrear of interest was then due, and requiring them not to pay any of the dividends to any person but to him R. Obbard, and also not to transfer the sum of 4232*l.* 16*s.* consolidated three per cent annuities to any person without the previous consent of R. Obbard. Under these circumstances the trustees transferred the sum of 4232*l.* 16*s.* consolidated three per cent annuities into * Court together with the dividends then due, under the * 270 provisions of the Trustees Relief Act, 10 & 11 Vict. c. 96.

In March, 1850, the infant children of Mr. and Mrs. Dalton presented a petition, stating the facts above mentioned; and also stating that for some time past Mr. and Mrs. Dalton had omitted to provide them with suitable diet, clothing, and general maintenance and support in proportion to the circumstances and condition in life of Mr. and Mrs. Dalton and the expectations of the petitioners, and that sums were owing for such diet, clothing, and general maintenance for the time past; and further stating, that no advancement had been made to any of the petitioners under the provisions contained in the settlement: the petition prayed that the dividends of the trust funds might be applied for the suitable diet, clothing, and general maintenance and support of the petitioners, in conformity with the indenture of settlement.

This petition came on to be heard before the Vice-Chancellor KNIGHT BRUCE, on the 13th June, 1850, when his Honor made the order now appealed from, directing the dividends of the trust funds to be paid to G. E. Evans, a solicitor who had been consulted by Mr. and Mrs. Dalton, during the minority of the petitioners or until further order, G. E. Evans undertaking to see the same from time to time properly applied in their maintenance and support. R. Obbard appealed from this order, as being inconsistent with his rights as mortgagee.

It appeared from the affidavits filed in support of the original petition; that Mr. and Mrs. Dalton had no other means of support than the dividends of the trust funds, and were in great distress and poverty; * that none of the children were able to earn a livelihood for themselves; that the dividends of the trust funds would not more than suffice to provide the children with diet, clothing, and general maintenance and support; that Mr. Dalton had expectations of a considerable fortune on the deaths of his relatives, and that his children had been brought up with such expectations. On the part of R. Obbard, it was alleged, that the 500*l.* had been advanced for the purpose of supplying Mr. and Mrs. Dalton with the means of maintaining their children, the accuracy of this statement being, however, disputed by the petitioners.

Mr. Malins and *Mr. Daniel*, for R. Obbard. — They contended that the question now raised was not one which ought to be decided on petition, the Court never having dealt with adverse interests or

with cases of disputed facts on petition under the Trustees Relief Act. On the main point they submitted, that the utmost right which the children could claim was one-half of the dividends; that if the question had been raised simply between the parents and children, it would have been impossible to make an order giving to the children the entire interest of the fund, merely on the suggestion that the whole income was necessary for the maintenance of the children; that the poor circumstances of the parents had no bearing on and could not increase the rights of the children which ought to be limited to a moiety of the dividends. They insisted that the petition was nothing else than an attempt to deprive the mortgagee of the security which under the assignment he was entitled to.

In reference to an objection which was thrown out in the course of the argument by the counsel for the * infant chil- * 272 dren, that after the order made on the petition of Mr. Dalton there was no interest which he could assign and that therefore the mortgage was void, they contended that, subject to the payment of the 30*l.* mentioned in the order, and which had been duly paid until the fund was brought into Court, Mr. Dalton had a full right to assign, the official assignee having no interest beyond the 30*l.* a year.

Mr. J. V. Prior for *E. Edwards*, the official assignee, claimed the 30*l.* in priority to the mortgage.

Mr. Wigram and *Mr. C. Hall*, in support of the order appealed from. — The objection to jurisdiction, if of any force, is made too late, not having been taken before the Vice-Chancellor. There is, however, nothing to prevent a disputed question of fact being disposed of on petition. *In re Upton Warren.* (a) The main ground of objection to the claim of the mortgagee is that he has really no *locus standi*, the whole of Mr. Dalton's interest having become, by the order of protection, vested in the official assignee. The order appealed from carries into effect the terms of the settlement, the dividends not being more than sufficient to provide for the maintenance and support of the petitioners.

Mr. Malins, in reply.

(a) 1 M. & K. 410.

[The case of *In re Bloye's Trust*, (a) and the 4th and 7th sections of the Act 5 & 6 Vict. c. 116, and the 10th section of the Act 7 & 8 Vict. c. 96, were referred to and commented on in the course of the argument.]

* 273 *THE LORD CHANCELLOR. — On the best consideration that I have been able to give to this case during the argument, I can see no objection to the order which has been made in the Court below.

The first point is, whether the question is one fit to be decided upon a petition; and in reference to this it has been said that there exists a conflict of evidence as to a certain fact connected with the purpose for which the advance of the 500*l.* was made. It does not, however, appear to me that the fact itself is material, for it would seem that the 500*l.* was not lent for any purpose specifically applicable to the children, but for the relief of the parents. What the case might have been if the money had been borrowed for the payment of a school debt, or for any other purpose directly referable to the children, I do not say; but as it is, the fact does not seem to me to affect the question I have now to decide. I think, also, that the case must be determined independently of the other objection which was raised on the ground of Mr. Dalton's interest being vested in the official assignee, and I shall not, therefore, enter into a discussion of that point.

What the Court has really to look to is, the terms of the settlement, and doing so, it is quite clear that the object of the deed was to secure the interest of the children, and I have now to give effect to that object according to the terms in which the parties have expressed themselves in reference to it. It is admitted that a condition or trust is annexed to the application of the income for the parents; and the question is whether, if the parents fail to perform that condition, they are to be entitled to the same interest as if no such condition had been attached. Looking at the
* 274 terms of *the deed, it would appear that the duty of the trustees, in the event of the parents not performing the condition, was to apply the trust funds in the same way as it was intended that the parents should themselves do. If this be so, it is the duty of this Court, which is put in the place of the trustees, to

(a) 1 Mac. & G. 488.

act in the same manner, and to do what the parents ought to have done ; that is, apply the fund for the maintenance of the children.

The question then arises, how the amount to be applied is to be ascertained. Mr. Dalton has been described as being in an independent position, and the situation and expectations of his children will be accordingly. They are, therefore, entitled to receive such an education as will enable them to associate with those in their own class ; and relatives and friends, who might be well disposed to assist their parents in their present reduced circumstances, may naturally expect that the trust funds should be applied for the education of the children. It is no argument to ask what in this case would become of the parents. I consider that they are entitled to all the residue of the fund after providing for the maintenance of the children ; and I also consider that I am fulfilling the intention of the deed, and of the parties to it, by directing so much of the funds as the children require to be applied for their benefit.

The present appellant says that he has advanced his money: he did this, however, knowing all the circumstances of the case, and acting as it would appear under advice ; and I cannot but suppose that there must be something more connected with the transaction than I have been able to see, for, as well from old habit as present sentiment, I think I should have hesitated long had I had to advise a gentleman to lend 500*l.* on a security circumstanced as this was. Mr. Obbard may have lent *his money from motives * 275 of benevolence and kindness ; and if so, I am sorry that he has been in any way disappointed.

On the whole, then, I am of opinion that the order of the Vice-Chancellor was consistent with the power of the Court, and that there was no need to postpone the case in order to put it in any other train of decision ; that neither Mr. Dalton nor Mr. Obbard can take any thing until after the maintenance of the children has been provided for ; and that the fund is so limited that the whole of it must be applied to that purpose. The present appeal will, therefore, be dismissed with costs.

Ex parte JAMES WILLIAM LOVEDAY.

In the Matter of JAMES WILLIAM LOVEDAY.

1851, December 8; and 1852, January 15. Before the LORDS JUSTICES.

After the finding of a jury upon a traverse of an inquisition of lunacy, that the alleged lunatic was of a sound mind, the Court, acting in the jurisdiction in lunacy, has no authority under the 6 Geo. 4, c. 58, or otherwise, to direct payment out of the property of the alleged lunatic, of any costs incurred with reference to the commission, although the verdict upon the traverse does not negative the lunacy at the time of the original inquisition.

Nor does a petition of the alleged lunatic for a *supersedeas*, and the delivery up of his papers and other property by the committee and the petitioners for the commission, entitle them to their costs as part of the terms on which such an order should be made, even where the Court has, by an order in the Lunacy made before the verdict on the traverse, directed the costs to be taxed.¹

THIS was the petition of Mr. James William Loveday, for a *supersedeas* of a commission of lunacy which had issued against him, and the delivery up of his property and papers by the committee.

The commission was issued on the petition of John Loveday and his wife, the brother-in-law and sister of the petitioner. The inquisition was held at the Shire Hall, Gloucester, before Mr. * 276 Winslow, one of the Masters in * Lunacy, on the 25th, 26th, 27th, and 28th days of February, and the 1st day of March, 1851, and the jury thereupon found that the petitioner was of unsound mind and incompetent to manage himself and his affairs, and had been so from the 16th of November, 1850.

On the 28th of May, 1851, an order was made on the petition of the present petitioner, giving leave to traverse the inquisition. The traverse came on to be tried on the 14th of August, 1851, and no evidence whatever being given of the lunacy, the following finding of the jury was, by consent, indorsed on the *postea*:—
“The jury find that the defendant is *now* of sound mind and sufficient for the government of himself, and his manors, messuages, lands, tenements, goods, and chattels.” But there was no finding as to the state of the petitioner’s mind when the commission issued, or at any previous period.

¹ See Anon. 4 De G. & J. 103.

The petition prayed that the commission and all proceedings taken thereunder might be superseded ; and that the respondents, Mr. Charles Baker who had been appointed committee, and John Loveday, might deliver over to the petitioner all deeds, documents, goods, and chattels of every description, in their or either of their possession or control, and belonging to the petitioner.

No grant of the lunatic's property had passed the Great Seal ; the proceedings for that purpose not having been completed before the verdict upon the traverse. Before this period, however, an order had been made upon the petition of John Loveday and his wife, directing a reference to the Master to tax their costs, charges, and expenses, properly incurred in and about suing out and prosecuting the commission ; and directing an * inquiry out * 277 of what funds or property belonging to the alleged lunatic, such costs, charges, and expenses should be paid ; and that when the Master should have made his report, such further order should be made as should be just.

The respondents offered no opposition to the *supersedeas*, but claimed the costs, the consideration of which had been reserved on their petition.

Mr. Rolt and *Mr. T. H. Terrell*, in support of the petition.—The Court has no power to give the costs asked by the respondents, having in this jurisdiction no authority to dispose of the property of a sane person. The *supersedeas* is a matter of right, and no terms can be imposed as a condition of granting it. *Ex parte Ferne*, (a) *Sherwood v. Sanderson*. (b) These cases, it is true, occurred before the 6 Geo. 4, c. 53, passed ; but that statute did not alter the law as regards the jurisdiction of the Court after a finding upon traverse. It only empowered the Court to make valid orders as to costs, notwithstanding the pendency of a petition to traverse.

The Solicitor-General and *Mr. Amphlett*, for the respondents.—In *Ex parte Ferne*, referred to by the other side, Lord LOUGHBOROUGH expressed his regret at the want of jurisdiction to give the costs ; and it was to remedy this want that the statute of 6 Geo. 4 was passed. The 4th section of that Act provides, that

(a) 5 Ves. 832.

(b) 19 Ves. 280.

it shall be lawful "for the Lord Chancellor, Lord Keeper, or
 * 278 Lords Commissioners, or other the person or persons * in-
 trusted, as aforesaid, from time to time, after the return of
 any such inquisition as aforesaid, and notwithstanding any peti-
 tion or order which may be depending relating to a traverse of
 such inquisition, to make such orders relative to the custody and
 commitment of the person or persons, and the commitment,
 management, and application of the estates and effects of any
 person or persons who shall or may have been found lunatic, idiot,
 or of unsound mind, by any such inquisition or inquisitions as he
 or they shall think necessary or proper; and all acts, matters, and
 things which shall have been done by any person or persons
 appointed committee or committees of the persons or estates of
 such persons found or to be found lunatic, idiot, or of unsound
 mind as aforesaid, or by any other person or persons, shall be, and
 are hereby declared to be, as valid and effectual, and such com-
 mittee, or other persons respectively, their heirs, executors, and
 administrators, are hereby indemnified in respect of such acts, mat-
 ters, and things from and against all actions, suits, and proceedings,
 damages, costs, charges, and expenses to be brought, commenced,
 had, or recovered by the person or persons so found lunatic, idiot,
 or of unsound mind, his, her, or their heirs, executors, or adminis-
 trators, or any other person or persons whomsoever, as fully and
 effectually, as if such inquisition had not been traversable, but no
 further or otherwise." Now these are terms large enough to
 enable the Court to dispose of the costs in such a case as the
 present. For even if the narrowest construction be put upon the
 Act, and it should be held to be confined to proceedings pending
 the trial of a traverse, still, in substance, an order respecting these
 costs was made pending the traverse; and what is now sought is
 the mere formal sanction of the Court to the result of the pro-
 ceedings there directed. But we submit that the section is
 * 279 perfectly general, and cannot be restricted * by the paren-
 thesis, "notwithstanding any petition or order which may
 be depending, relating to a traverse of such inquisition." More-
 over, the verdict on the traverse does not in any manner impeach
 the original verdict, and therefore it must be taken that at the
 time when these costs were incurred the petitioner was a lunatic,
 and that his property was properly subject to the order respecting
 costs which the Court then made. If the order had been for pay-

ment of the costs, there could have been no doubt as to the application of the Act of the 6 Geo. 4. Is not an order for taxation, which implies the propriety of payment, the same thing? At all events, the Court may impose terms on the petitioner. While he was a lunatic, his papers properly came into the custody of his committee. Can he be allowed to recover them without paying the charges which have been properly incurred on his behalf? His application is to the jurisdiction in lunacy; if there is none, he can have no relief. Since he seeks relief in this jurisdiction, he must do what is just with regard to it.

[The Lord Justice KNIGHT BRUCE inquired what fund there was under the control of the Court, there having been no grant of the estate; and whether the 6 Geo. 4, c. 53, § 4, did not appear to contemplate only cases in which there had been such a grant.]

In *Ex Parte Glover*, (a) where a commission was superseded, Lord ELDON said, that if the solicitor, in suing out the commission, had proceeded for the benefit of the individual, and a committee had been regularly appointed, his Lordship might have done something with respect to the costs. But he did not say that the formal grant of the custody of the estate was required to give jurisdiction, if there was a fund.

* *Mr. Rolt*, in reply. — To impose payment of the costs as * 280 a condition for the delivery up of the papers would be fruitless, as the papers might be recovered in an action of trover. With regard to the 6 Geo. 4, c. 53, if the Court could deal with the property of the petitioner, it might with his person, for the terms of the statute apply equally to both.

1852. January 15.

THE LORD JUSTICE LORD CRANWORTH. — This is the petition of James William Loveday, against whom a commission of lunacy has issued. The prayer is, that the commission and the proceedings under it may be superseded, and that Charles Baker and John Loveday may be ordered to deliver up to the petitioner the deeds and documents and property of the petitioner in their hands.

(a) 1 Mer. 269.

[215]

The facts of the case are these: A commission was issued at the instance of John Loveday against James William Loveday. Under the commission, James William Loveday was found to be a lunatic, and those who sued out the commission proceeded to obtain the appointment of a committee. The respondent, Charles Baker, was appointed committee, but no grant was made to him of the property of the alleged lunatic. The finding of the jury under that commission was traversed, and on the trial of the traverse the result was a finding, not perhaps strictly correct, merely that James William Loveday was not a lunatic at that time; but that he was at that time of sound mind, and capable of governing himself and his property, leaving unnoticed the question whether he was of unsound mind at the time of the issuing of the commission and inquisition thereunder. The present petition was then presented by James William Loveday, praying a *supersedeas* of the commission, and that Charles Baker, who was to have

* 281 * been committee under the commission, and John Loveday, who, with his wife, sued out the commission might be ordered to deliver up all papers, documents, and property in their possession belonging to the petitioner.

The superseding of the commission is a matter of course, and the only question which we wished for time to consider is, whether there is jurisdiction in lunacy, in the circumstances of this case, to give the costs of suing out that commission. Another question would have been as to the propriety of giving the costs, if we have jurisdiction to give them; and we took the opportunity of speaking upon this part of the case to the Lord Chancellor, from whom we heard that he was satisfied the parties had acted *bonâ fide*.

Under these circumstances, if we have jurisdiction, we think the case a perfectly fit one in which to give the costs. Therefore the only remaining question is, whether we have jurisdiction. Now, there was no such jurisdiction independently of the recent Statute of 6 Geo. 4, c. 53. That was decided by Lord LOUGHBOROUGH in *Ex parte Ferne*, (a) in which case the form of the traverse was, that the party was a lunatic at the time of the marriage and at the time of taking the inquisition. That was not the time in question. The time was that of the verdict being given, but the verdict was that at that time she was not a lunatic. The party not being then

(a) 5 Ves. 833.

a lunatic, a *supersedeas* was of course. Then came the question of costs. The then Solicitor-General and Mr. Fonblanque, for the family of the Wraggs, pressed for costs, observing that they had established a lunacy at the time. That appears to be a stronger case than the present, where it is left in doubt whether, at the time of the inquisition, the petitioner * was a lunatic ; * 282 the verdict found being simply, that the party was not a lunatic at the time of the finding upon the traverse. In that case, of *Ex parte Ferne*, (a) the Lord Chancellor, Lord LOUGHBOROUGH, wished to give the costs ; but he said : “ Where is the fund to pay the costs ? Where the commission is superseded, there can be no fund. There is a step to be taken, possession to be taken of the property. The traverse stops that. The lands and goods have never come into the hands of the Crown. The traverse is *de jure*. It is no favour. The parties apply by petition, stating that they are dissatisfied with the finding, and that stops the commission. There is no *amoveas manus* here. If I could act *cum imperio*, it is a very proper case ; and the parties have entitled themselves to all the costs I can give them ; but I have no jurisdiction.” That was the opinion of Lord LOUGHBOROUGH ; and in a case of *Sherwood v. Sanderson*, (b) the principle was fully recognized by Lord ELDON. In that case he was able to give costs, not *simpliciter* by virtue of the jurisdiction in lunacy, but because the property of the lunatic consisted in part of a fund in chancery, over which he had jurisdiction. Lord ELDON thought he might deal with that fund for the purpose of giving costs, but he recognized the doctrine of Lord LOUGHBOROUGH in the previous case. The ground of the doctrine is, that the jurisdiction is confined to the administration of the property of the lunatic ; and if there never was a lunacy, there is nothing in the hands of those who exercise the jurisdiction to administer.

That being the doctrine previously to the Statute 6 Geo. 4, c. 53, the question is how far it is altered by that statute. The statute is intituled “ An Act for limiting the Time within which Inquisitions of Lunacy, Idiotcy, and *Non Compos Mentis*, may be traversed, * and for making other Regulations in the Proceed- * 283 ings pending a Traverse.” Now, if the enactments of the statute are sufficiently extensive to comprehend a case of this kind,

(a) 5 Ves. 833.

(b) 19 Ves. 280.

I agree that it is immaterial to look at the title ; and that the fact that the title only refers to proceedings pending a traverse, would not affect the case. Let us see then whether the enactments give any jurisdiction over the property of the lunatic or the costs, at any other time except pending the traverse. If not, when once there is a verdict against the lunacy, the law would stand just as it did before the statute. The 4th, which is the material section of the Act, enacts, " that it shall be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners, or other the person or persons intrusted as aforesaid, from time to time, after the return of any such inquisition as aforesaid, and notwithstanding any petition or order which may be depending relating to a traverse of such inquisition, to make such orders relative to the custody and commitment of the person or persons, and the commitment, management, and application of the estates and effects of any person or persons who shall or may have been found lunatic, idiot, or of unsound mind, by any such inquisition or inquisitions, as he or they shall think necessary or proper." Does that authorize the Lord Chancellor, or the persons acting in the jurisdiction of lunacy, to deal with the property of the alleged lunatic after the trial of a traverse finding him not a lunatic ?

We have come to the conclusion (it being necessary to decide this, because if we had jurisdiction and could act, then we should be inclined to give costs) that we have no such authority given to us by the statute. There are two main grounds on which, after narrowly considering the words of the statute, we think that must be taken to be the result. We reject the words

* 284 * of the title to the statute, but we find exactly the same meaning in the words of the 4th section. The words are, " it shall be lawful for the Lord Chancellor, &c., from time to time, after the return of any such inquisition, and notwithstanding any petition or order which may be depending, relating to a traverse of such inquisition, to make such orders relative," and so on. The effect is, that notwithstanding any petition or other proceeding, the Court may proceed ; that is, you need not wait, as before the statute you must have waited, till the absolute establishment of the lunacy on the trial of the traverse : but you may, in the mean time, deal with the property on the foundation of the inquisition pending the inquiry as to the lunacy. These considerations go far to show that the power given by the statute beyond

what existed before, was meant to be conferred only pending the trial of the matter upon the traverse. But that conclusion is made abundantly clear when we see to what a contrary construction must necessarily lead. It must lead to this, that this jurisdiction is given to deal with the person as well as the property of the alleged lunatic. The enactment enables the Court "to make such orders relative to the custody and commitment of the person and persons, and the commitment, management, and application of the estate and effects" of the alleged lunatic. These words are all of the same sentence, and are all governed by the words "it shall be lawful to make such orders." To what period then is it that that jurisdiction is meant to extend? Is it to the period up to the time of the verdict against the lunacy, or is it to continue beyond that? If beyond, it must be meant that the Court should have power to deal with the person as well as the property; and, on the other hand, if the Court is not enabled to deal with the person, neither is it enabled to deal with the property. The whole is one enactment, and the whole relates to *one * 285 period. This, in effect, is a *reductio ad absurdum*.

That being so, it is unnecessary to point to the other difficulties which have been suggested. Then arises the other point which has been suggested, namely, that inasmuch as the gentleman who was intended to be the committee, and those who sued out the commission, have property and papers in their possession belonging to the alleged lunatic; and the petition asks that they may be ordered to deliver up these, whether, although we could not make an order giving the costs, we might not make the delivery up of the property and documents conditional on payment of the costs. We have considered that, and we are of opinion that we are not entitled to impose any such terms. The delivery up of the property and documents by the respondents, now that the alleged lunacy has been successfully traversed, is a matter of simple justice. The respondents took into their possession property and papers belonging to the alleged lunatic, because that was deemed necessary for his protection by anticipation as it were, upon the assumption that the result of the inquisition would be to establish a title to them in the respondents. In that state of things it was reasonable that they should hold them; but where upon the result of the traverse he is found not to be a lunatic, of course they are his own property, and he is entitled to the possession of them.

Indeed, any attempt to impose such terms would be nugatory, and would leave the parties open to an action of trover or other action at the instance of the petitioner.

The order which we make is an order to supersede the commission, and that the respondents deliver up the papers and property of the petitioner in their possession.

1852. January 16. Before the LORDS JUSTICES.

In settling a wife's property under an order of the Court giving effect to her equity to a settlement, there is no established rule entitling her to have the property limited in the events of failure of issue of the marriage, and of her dying in her husband's lifetime, upon such trusts as she shall appoint, and subject thereto upon trusts excluding the husband from any interest in the settled portion of the property.¹

In the absence of special circumstances, the limitation in the events above mentioned should be to the husband,² and the facts of his having assigned his interest, and having become insolvent, and of the wife's relations being in humble circumstances, were held not sufficient to justify a departure from the general rule, to the prejudice of a purchaser from the husband.

THIS was an appeal from a decision of Vice-Chancellor PARKER, reported in 5 De Gex & Smale, 49, where the facts are fully stated.

The Master had approved of a settlement out of a fund in Court, to which a married woman was entitled under a will, being one-fifth part of a sum of 5000*l.* bank stock. She and her husband had assigned the fund to the appellant, and the husband had become insolvent. The proportion which the Master considered proper to be settled was two-thirds, and the trusts of the settlement as approved of by him, so far as they are material with reference to the question raised by the appeal, were to pay the income to the wife for life for her separate use, without power of anticipation, and, after her decease, upon trusts for the issue of the marriage;

¹ See *Corley v. Lord Stafford*, 1 De G. & J. 238; *Stanley v. Jackman*, 23 Beav. 450; *Ward v. Yates*, 1 Dr. & Sm. 80.

² 1 Dan. Ch. Pr. (4th Am. ed.) 108; *Bagshaw v. Winter*, 5 De G. & S. 466; *Gent v. Harris*, 10 Hare, 383; *Ward v. Yates*, 1 Dr. & Sm. 80; *Spirett v. Willows*, L. R. 1 Ch. App. 520.

and in the event of there being no issue who should attain a vested interest under the trusts, upon such trusts as the wife should appoint, and for want of appointment, in trust for her next of kin, according to the Statute of Distributions, as if she had died without having been married. The Vice-Chancellor had confirmed the Master's finding as far as regarded the above trusts, except that his Honor thought that the power given to the wife in default of issue of the marriage, and in the event of her surviving her husband, should be confined to an appointment by will.

* The purchaser appealed against this decision.

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Mr. Swanston and *Mr. Eddis*, in support of the appeal. — According to the terms of the order of reference, the Master was to approve of a settlement for the benefit of the wife and the issue of the marriage. The limitation for the benefit of the wife's next of kin does not fall within the scope of this reference. Even the children of a marriage have no claim except such as they derive from their mother; and if she dies before a settlement is made, the husband takes the whole fund discharged from any equity on the part of the children. *Murray v. Lord Elibank*. (a) In the case of *Like v. Beresford*, (b) which was a case of clandestine marriage with a ward of court, the settlement made by the direction of the Court settled the fund in default of issue, and in case of the death of the wife in the lifetime of her husband, upon such trusts as she should appoint, and, subject thereto, in trust for the husband. There is no suggestion in any of the cases which can be found of any person but the wife and the issue being within the scope of the wife's equity to a settlement.

They also cited *Lloyd v. Williams*, (c) *Packer v. Wyndham*, (d) *Worrall v. Marlar*, (e) *Sturgis v. Champneys*, (g) *Jacobs v. Amyatt*. (h)

Mr. Wigram and *Mr. Toller*, for the wife. — The limitations of this settlement are those usually * adopted, and are * 288 in fact entirely in accordance with the order of reference. They are the most beneficial to the wife that can be devised. In

(a) 10 Ves. 84, and 13 Ves. 1.

(d) Prec. in Ch. 412.

(b) 3 Ves. 506.

(e) 1 Cox, 158.

(c) 1 Madd. 450.

(g) 5 M. & C. 97 and 104.

(h) 1 Madd. 376, note; see also 10 Beav. 324.

making a settlement upon a wife, the Court leaves to the husband a portion of the fund, on the terms of his giving up the settled portion. The practice does not proceed upon the principle of the husband being bound in equity to provide for his wife and children, otherwise it would not be competent to her to waive her children's equity. In a case where the wife had poor relations, a power to appoint the trust fund to their benefit might be beneficial to the wife.

[THE LORD JUSTICE LORD CRANWORTH.—Do you wish for an opportunity of adducing evidence with regard to any special circumstances in the case?]

As the fund is a small one, it may perhaps be better, before incurring that expense, to state to the Court what the respondents would be able to show; it would be this: that the wife has a brother and sister in humble circumstances, who have been compelled to part with their shares under the will.

They cited *Wilkinson v. Charlesworth*, (a) *Millet v. Rowse*, (b) *Bathurst v. Murray*, (c) *Pearse v. Crutchfield*, (d) *Burkett v. Hibbert*. (e)

Mr. Swanston, in reply, was stopped by the Court.

THE LORD JUSTICE KNIGHT BRUCE.—We are of opinion that there is not nor ought to be any established rule, giving as
 * 289 a matter of course, unless * cause be shown to the contrary, such a power to the wife, and such a contingent interest to her next of kin as are here contended for. Circumstances may exist in a particular case which may render one or both proper, nor do we suggest that it is not within the power of the Court so to frame a settlement; but we think, as I have said, that a special case must be made for it. We think that, assuming the facts mentioned by *Mr. Wigram*, and no more, to be true, they are not sufficient for the purpose; and it is therefore our opinion, that, in the circumstances of this case, whether as now appearing, or as

(a) 15 Law J. Ch. 388.

(d) 16 Ves. 48.

(b) 7 Ves. 419.

(e) 3 M. & K. 227.

(c) 8 Ves. 74.

varied by the additional facts stated by *Mr. Wigram* there ought, with reference to the possibility of this lady dying in the lifetime of her husband, not to be any power of appointing by will, otherwise, of course, than in favour of her children, and not to be any provision for her next of kin, not being her issue.

THE LORD JUSTICE LORD CRANWORTH. — I am of the same opinion. I regret that the terms of the settlement should have to be discussed in each particular case, and that there can be no general rule laid down *ab ante*, as to all settlements; but it is an inconvenience inherent in the nature of things; such a rule could be productive of nothing but injustice in a great variety of cases. The Court must make such a settlement as it thinks just and reasonable in the circumstances of each particular case. If there are no special circumstances in the case, the Court provides for the wife for life out of the fund, and afterwards gives it to the issue, if any; if none, and the wife survives, to her absolutely. If there should be no issue, and the husband should survive the wife, then, in the absence of special circumstances, there arises the application of the general rule resulting from the legal right of the husband.

* HARBY v. THE EAST AND WEST INDIA DOCKS * 290
AND BIRMINGHAM JUNCTION RAILWAY COM-
PANY.

1851. December 19. 1852. January 12, 22. Before the Lord Chancellor
Lord TRURO.

Lessees of premises, occupied by them as a ropery, agreed to withdraw their opposition to a bill in Parliament for a railway which would intersect the ropery. The agreement, among other stipulations, provided that the railway should be so constructed as that when finished the level of the ropery should not be altered, nor the surface of the ropery be in the least respect diminished. *Held*, that the railway company were bound to restore the surface so as to be available for all purposes to which it might have been applied before the construction of the railway, and not for the purposes of a ropery only.

THIS was a motion on the part of the defendants to discharge or vary an order made on the 17th June, 1851, by the Vice-Chancellor KNIGHT BRUCE, under the following circumstances.

The plaintiffs were the lessees and occupiers of certain premises which were used by them as a ropery. The defendants proposed to construct a railway which would intersect the ropery; and pending their application to Parliament, and in order to get rid of the plaintiffs' opposition, they entered into an agreement by which they contracted to construct the railway through the said ropery, "so that when finished the present level of the said ropery shall not be in the slightest degree altered at any portion thereof, nor the surface area, length, or extent of the said ropery in the least respect diminished, notwithstanding that the section of the said railway, lodged in Parliament, shows that where the line passes through the said ropery, it is intended to alter the level thereof; and notwithstanding that the plan of the said line shows that a portion of the said ropery will be cut through and carried away." The agreement empowered the company to substitute another ropery for the plaintiffs', or to pay the plaintiffs 8000*l.* in full for all their interest in the lease and damage to their ropery; but these clauses of the agreement were not acted on.

* 291 * Differences having arisen between the plaintiffs and the defendants as to the character of the bridge, by means of which the ropery was proposed to be crossed by the railway, the defendants at once entered into possession of the plaintiffs' lands, having served them with a notice under the 85th section of the Lands Clauses Consolidation Act, whereupon the plaintiffs filed their bill and obtained an injunction *ex parte*. This was subsequently dissolved by consent, the company undertaking to build the bridge to the satisfaction of an engineer approved by the plaintiffs. The plaintiffs and defendants, however, still differing as to the principle on which the bridge was to be built, the present question, upon the construction of the agreement, was submitted to the Vice-Chancellor KNIGHT BRUCE, who, on the 17th June, 1851, decided that, according to the true interpretation of the agreement, the owners of the ropery or its lessees were entitled to as firm, strong, and solid a surface as the undisturbed earth presented in its original state before the railway was contemplated. The defendants having been thus left to the fulfilment of their undertaking with the above expression of the Vice-Chancellor's opinion upon the agreement, the plaintiffs, on the 26th November, 1851, applied to the Vice-Chancellor PARKER, and obtained an order for a sequestration against the defendants, which was granted, but sus-

pended for a month to enable the defendants to appeal to the Lord Chancellor. The defendants now appealed from both orders. The appeal from the order pronounced by the Vice-Chancellor KNIGHT BRUCE came on first to be heard.

Mr. Rolt, Mr. Daniel, and Mr. Bazalgette for the appellants.— They submitted that the case fell within the 85th * section of the Lands Clauses Consolidation Act, the * 292 agreement not providing for the amount of compensation, and that the notice therefore was quite in conformity with the agreement; that the plaintiffs, being mere lessees, had no right to the ground beneath the surface; that in their petition to Parliament their opposition was confined to the destruction of their ropery alone, and that the obvious meaning of the parties, when the plaintiffs consented to withdraw their opposition, was that the company should substitute a level surface equally available for the purposes of a ropery, as was theretofore enjoyed by the plaintiffs; and that the plaintiffs had by their conduct acquiesced in such a construction during the formation of the railway.

Mr. Bethell, Mr. Malins, Mr. Follett, and Mr. Logie, contra.— They contended that the notice under the 85th section was a direct violation of the agreement; that so far from having acquiesced in the defendants' construction of the agreement, the plaintiffs had filed their bill as soon as they had any reason to suspect its intended violation; and that the result of construing the word "surface" in the agreement in the sense attributed to it by the defendants, would be to preclude the plaintiffs from converting the ground to building purposes, and in fact to make it compulsory on the plaintiffs and their successors for ever after to keep a ropery or to sacrifice the land altogether.

Mr. Rolt, in reply.

THE LORD CHANCELLOR.— The question is entirely one upon the construction of the agreement; that agreement appears to me to have had two main objects in view. It was contended on the * part of the appellants that the agreement had but * 293 one object; viz., the restoration of the surface for the purposes of a ropery. The first object undoubtedly was the restora-

tion of the surface for such a purpose to a given level, but it also had the object of preventing the railway company from using the land by means of an open cutting; it does not express how deep below the surface the railway was to be made, in the event of its not being carried over the plaintiffs' ropery.

It appears that the land was not originally used for the purposes of a ropery, and that the plaintiffs first so used it; but there is nothing to show that the future application of the land is to be confined to that of a ropery. It further appears that two houses have been built by the plaintiffs, and it is said they contemplate building other houses; without however attaching any weight to this circumstance, yet in considering for what purpose generally the restoration was to be made, am I warranted in holding, or is there any more reason for saying, that the restored surface was intended only to be of a sufficient degree of strength to support a light carriage, and not a heavy one or a house; in short, how am I to fix the limit as to the weight which the restored surface is to bear, and how is it to be ascertained? As therefore I can see nothing in the agreement to qualify its plain meaning, and as there is nothing in it to restrain its operation to the plaintiffs' tenancy, I think the surface ought to be restored so as to be available for all the purposes to which the adjoining surface is available; and in my opinion it would not be a just construction to hold that because the agreement contains a stipulation for the restoration of the level for the purposes of the ropery, that therefore the agreement implies that it shall be restored for that purpose exclusively; yet that is the defendants' construction. In the case of

* 294 a mining * lease, where the lessee is under covenant to restore the surface to its original condition, the obvious meaning of such a covenant is that the ground shall be restored for all practical purposes and uses to which it has been previously applied. I think the Vice-Chancellor's construction was the correct one, and that this appeal must be dismissed with costs.*

* The second appeal motion was not proceeded with, and, on payment of the costs of the motion, a month's further time for the issuing of the sequestration was granted.

Ex parte STAPLES.

In the Matter of BROWNE and of the OXFORD AND BLETCHLEY JUNCTION AND BUCKINGHAMSHIRE RAILWAY ACTS.

1852. January 23. Before the LORDS JUSTICES.

The petition of a tenant for life under the Lands Clauses Consolidation Act, 1845, for reinvestment in the purchase of land of the proceeds of settled property taken by a railway company, need not be served upon any person entitled in remainder.

THIS was the petition of the tenant for life of lands in settlement, which had been purchased by the above-mentioned railway company under the disability clauses in the Lands Clauses Consolidation Act, 1845. The purchase-money had been paid into the bank, and invested in the funds according to the provisions of the Act, and an opportunity having been found for reinvesting part of the money in the purchase of other lands, the present petitioner had presented the usual petition for a reference to the Master as to the fitness of the proposed reinvestment, and the title of the vendor.

The Master had made his report approving of the proposed purchase, whereupon the petitioner presented the present petition, praying that the Master's report might be confirmed; and that so much of the fund in Court as would be sufficient to raise the purchase-money of the lands proposed to be purchased might be sold out, and the proceeds * paid to the vendor on his * 295 executing a conveyance of the land. Upon the petition coming on to be heard, the Vice-Chancellor KINDERSLEY thought that the parties entitled in remainder under the settlement ought to have been served with the petition, and upon being informed that the usual course had been not to require service upon any of the persons entitled in remainder, and that the introduction of a different practice would greatly increase the expenses to which railway companies were subject, his Honor desired that the question might be submitted to this Appellate Court.

Mr. Bethell and *Mr. Speed*, for the company. — Since the commencement of railway business in 1832, it has been the prac-

tice to make orders for reinvestment without requiring the persons interested in remainder to be served. By the 7th section of the Lands Clauses Consolidation Act, 1845, a tenant for life is enabled to convey without the concurrence of the remainder-man, and by the 70th section a tenant for life may petition to have the money laid out in the purchase of other lands, and to have the money invested in government or real securities in the mean time. The Act does not require service upon any person entitled in remainder.

[THE LORD JUSTICE LORD CRANWORTH. — Your contention is, that the legislature intended to make the tenant for life a sort of protector of the settlement. I observe that where the fund is less than 200*l.* the 71st section of the Act provides that it may be paid to two trustees to be nominated by the tenant for life, approved of by the company, and by them applied in the purchase of other lands. It appears that in that case the trustees might act without the consent of the *cestuis que trustent* under the settlement.]

The person to act throughout is the tenant for life, he
 * 296 * makes the sale to the company with the safeguards provided by the statute, and he is the person to suggest the manner in which the purchase-money is to be dealt with. The Court acts upon that suggestion, and takes upon itself to protect the interests of all persons interested in the inheritance. That has been the course hitherto invariably pursued. The effect of holding that it has not been according to law would be to put in hazard an enormous amount of capital paid away by railway companies upon the faith of the practice hitherto invariably adopted.

[THE LORD JUSTICE LORD CRANWORTH. — Great difficulty might occur where the persons entitled in remainder are under disabilities. It would appear that the person intrusted by the legislature with the power of selling the property might be equally well intrusted to select a proper reinvestment, especially as the investment is required to be made with the sanction of the Master.]

If the remainder-man must be served, why must not persons having charges on the estate ; for example, legatees ?

Mr. Baggallay, for the petitioner, said that the Vice-Chancellor had consulted two other of the Judges upon the subject, and that they had concurred in his Honor's conclusion.

THE LORD JUSTICE KNIGHT BRUCE. — Taking analogy and practice together, I think it inexpedient to change the usage hitherto pursued.

THE LORD JUSTICE LORD CRANWORTH. — If the question had come before me in 1832, when the first statutes were passed, I rather think my decision would have been in accordance with the practice hitherto adopted ; but when it appears as matter of fact that this * practice has gone on for twenty years, and * 297 no inconvenience has been shown to have resulted from it, I am certainly not prepared to say that the practice should be changed.

Ex parte The EARL OF HARDWICKE.

In the Matter of The ROYSTON AND HITCHIN RAILWAY COMPANY'S ACT, 1846.

1852. January 30. Before the LORDS JUSTICES.

A railway company gave the usual notice to a tenant for life of settled estates that they required a portion of the estates for their line, and afterwards made an offer for the fee-simple. The solicitor of the tenant for life accepted the offer, stipulating that interest at 5*l.* per cent should be paid from the time of the company taking possession, and proposing that, as the title was well known, the company should be satisfied without the production of the deeds. To this the company objected, and proposed to pay the money into a banker's in the names of the respective solicitors pending the investigation of the title. The tenant for life's solicitor thereupon suggested that, as the money must be paid into Court, it had better be so at once. The company thereupon paid the money into Court to the account of the Railway Act only, and communicated to the tenant for life's solicitor that they had paid the money into Court under the 69th section of the Lands Clauses Consolidation Act. The solicitor for the tenant for life thereupon reminded them that interest at 5*l.* per cent would continue to be payable till the purchase was completed. To this the company's solicitor returned no answer, and, although several other communications passed between the solicitors respecting the purchase, the com-

pany's solicitor did not, till a year afterwards, express any objection to the payment of interest. The money remained uninvested during the whole of that period. *Held*, that the company had acquiesced in the vendor's view of the case, and were bound to pay interest up to the investment.¹

THIS was the appeal of the Royston and Hitchin Railway Company from an order made upon the petition of the Earl of Hardwicke, directing, among other things, payment of interest upon money agreed to be paid by the appellants for the purchase of land of which the Earl of Hardwicke was tenant for life.

On the 3d of November, 1846, the Royston and Hitchin Railway Company, in pursuance of the provisions of their special Act, with which the Lands Clauses Consolidation Act, 1845, was incorporated, gave notice to the Earl of Hardwicke that they required to purchase and take for the purposes and under the provisions of these Acts, certain pieces of land containing 12 acres and 33 perches, being part of certain settled estates, of which the earl was tenant for life; and after some communications between the solicitors for the company and the earl, the company offered the sum of 1700*l.* for the purchase of the fee-simple of the pieces of land.

In answer to this offer, one of the earl's solicitors wrote as follows:—

"I will, on his Lordship's behalf, agree to your offer of 1700*l.* for the 12a. 0r. 33p., and the damage by the severance; interest at 5*l.* per cent to be paid on the 1700*l.* from the time when the company take possession of the land, the bridge, and two level crossings across the rail, being made according to your letter of the 24th March, and the abstract to be considered as verified by the copies of the deeds in my possession, without production of the original deeds, which are in Lord Hardwicke's muniment room locked up, and at present inaccessible; a stipulation which I make only to save trouble, and which may unhesitatingly be assented to by you, as Lord Hardwicke's title is beyond question, the same having already been several times investigated. It may be proper for me to add that his Lordship is only tenant for life, with remainder to his eldest son in tail male, with divers remainders over; consequently the money will have to be paid into Court: but I assume you were aware that his Lordship's estates were in settlement."

¹ See *Lewis v. South Wales Railway Co.*, 10 Hare, 113.

On the 8th May, 1849, one of the company's solicitors, * in reply to the above letter, wrote to the earl's solicitors * 299 as follows: "I cannot consent to consider the abstract as verified by the copies of the deeds now in your possession; but if you will prepare and send me the abstract of title, and I find, on reference to it, that the money must go into Court, it can be at once paid in, and the company take possession of the land, reserving the verification of the title to a future opportunity. I assume, from what you say, that his Lordship's eldest son is a minor."

On the 20th of June, 1849, one of the earl's solicitors wrote to the company's solicitors as follows: "The Earl of Hardwicke's title. — We send you the abstract, which will fully show you: first, that the present earl is tenant for life only; and, secondly, that his son is a minor, and tenant in tail male in reversion." After referring to the mode of identifying the said land, the letter proceeded as follows: "As, by the Lands Clauses Consolidation Act, a tenant for life may convey the fee-simple as against all parties interested in the property, we have not done more than allude to the charges affecting the estate, which we apprehend is all which is necessary."

On the 22d of June, 1849, one of the company's solicitors wrote to the earl's solicitors a letter which, after proposing that the conveyance should be made by certain trustees under a power of sale, in order to avoid the necessity of a payment into Court, proceeded as follows: "I therefore propose, until the purchase can be completed, to deposit the money at Messrs. Masterman's bank, in the joint names of myself and your Mr. Van Sandau, and the usual agreement for deposit shall be sent in the course of to-morrow."

* To this proposal one of the earl's solicitors replied, * 300 objecting to the sale being effected by the trustees. He afterwards wrote again, suggesting that as the purchase-money would necessarily have to be paid into Court, it was better that the money should at once be paid into the Bank of England in the name of the Accountant-General of this Court, instead of being paid to the proposed bankers.

On the 30th June, 1849, one of the company's solicitors replied to these letters as follows: "I have given full consideration to your observations in reference to the point raised upon this title; and I am willing, under the circumstances, to take the conveyance

from his Lordship as tenant for life. I have therefore bespoken the usual directions, and shall immediately proceed to pay the money into Court."

On the 6th July, 1849, the company caused the purchase-money to be paid into the Bank of England, in the name of the Accountant-General, to the credit of "*Ex parte* the Royston and Hitchin Railway Company, In the matter of the Royston and Hitchin Railway Act, 1846;" and on the same day communicated the fact to the earl's solicitors in the following letter:—

"Royston and Hitchin Railway and Earl Hardwicke.—The purchase and compensation money, 1725*l.*, has this day been paid into Court under the 69th section of the Lands Clauses Consolidation Act, and herewith I send you a copy of the bank receipt."

The company took possession of the land, and on the 13th July, 1849, one of the earl's solicitors wrote to the company's solicitors, as follows:—

* 301 * "We beg to remind you that the company will have to pay Lord Hardwicke interest, after the rate of 5*l.* per cent on the compensation money, till the completion of the purchase; and that the money deposited cannot be invested, unless by consent and at the risk of the company, consequently every delay occasioned by the scrutinizing of the title will be attended with considerable costs to the company, and every requisition which cannot be met, save after communication with Lord Hardwicke, who is absent from England, will occasion considerable delay."

"As Lord Hardwicke will not object to receive 5*l.* per cent interest for the compensation money, we perhaps have no reason for hurrying the completion of the purchase; but we have thought it only proper to remind you that interest will be payable and required, and consequently any delay in the approval of the title will be detrimental to the company."

No answer was sent to this letter. On the 25th July the respondent's solicitor intimated to the solicitors of the company that the muniments of title might be compared with the abstract, and requested an appointment for that purpose; and in answer thereto one of the solicitors of the company wrote on the 26th of July as follows:—

"Our engagements at present are so pressing and urgent that it is impossible I can yet make any appointment to proceed to Win-

ple for the purpose of examining these title-deeds, but I will do so as soon as possible."

On the 3d of October, 1849, the company's solicitors * made an appointment for the examination of the title- * 302 deeds, which so far as they were in the earl's possession were thereupon produced and examined by one of the company's solicitors.

On the 6th November following the earl's solicitor urged the company's solicitors to bring the matter to a close; but it was not until the 10th January, 1850, that the company's solicitors wrote to say that they were satisfied with the title of the earl as tenant for life, subject to certain requisitions. A long correspondence then ensued, on the subject of these requisitions; and on the 17th of June, 1850, the company's solicitors for the first time disputed the liability of the company to pay interest, which they did by a letter of that day in the following terms:—

"It is impossible for us to say that we are satisfied with this title until all the deeds shall have been produced; but the purchase and compensation money has, as you are aware, been paid into Court, pursuant to the Act of Parliament, from which time the company ceased to be liable to the payment of interest."

Since the payment into Court, the purchase-money had remained in the bank unproductive.

On the 1st of July, 1850, the company's solicitors wrote to the earl's solicitors as follows:—

"If you will present the usual petition for the investment of the purchase-money and payment of dividends to Lord Hardwicke as tenant for life, we will appear and consent on the part of the company to the investment, on the understanding that the petition should stand over until the completion of the purchase, when * you make to the Court the application for the payment of * 303 the dividends. This will obviate any question as to the expense of two petitions."

To this letter one of the solicitors of the earl replied, expressing his willingness to petition for the investment of the purchase-money, so that it might become productive in the interval before the completion of the purchase, but without prejudice to the earl's claim for interest on the purchase-money up to the completion of the purchase, and without prejudice to any other question between the earl and the company.

A petition was accordingly presented by the earl, and on its coming on to be heard, the question as to the right of the petitioner to interest was discussed, it being agreed that the question should be, if practicable, decided upon that application.

The question having been fully argued and the above facts being established by affidavits, it was ordered that the sum in Court, amounting to 1725*l.*, should be invested in 3*l.* per cent annuities, and the dividends paid to the petitioner; and that the company should, on or before the 20th day of January, 1852, pay to the petitioner interest on the sum of 1725*l.* in the petition mentioned at the rate of 5*l.* per cent per annum, from the 6th day of July, 1849, up to the date of the investment.

Against this order the company appealed.

Mr. Bethell and *Mr. Wickens*, for the company. — The company in this case never contracted to pay interest. They paid the money into Court under the provisions of the 69th section of the * 304 Lands Clauses Consolidation * Act, which provides that the moneys so paid in shall remain deposited in Court until they are invested in some one of the modes specified in the section, and which investment can only be made upon the application of the person who would have been entitled to the rents and profits of the land. The petitioner, therefore, was the only person upon whose application the money could have been invested; and if it has remained unproductive, this has arisen from the petitioner himself having omitted to make an application, and does not entitle him to call upon the company for payment of interest. The statement in the letter of the 13th of July, that interest would be payable, was altogether erroneous; it would be most unreasonable that a company should have to pay interest until a tenant for life shall think proper to procure an investment for the money.

[THE LORD JUSTICE LORD CRANWORTH. — After payment into Court, what jurisdiction have we under these Acts to direct payment of interest?]

The counsel on both sides agreed that no objection should be taken for want of jurisdiction, and requested that the question might be disposed of as if a bill had been filed.

Mr. Bethell and *Mr. Wickens*, in continuation of their argument. — In *Ex parte Cofield*, (a) Lord Justice KNIGHT BRUCE held that where purchase-money had been paid in under the 69th section, the tenant for life might petition for payment of dividends, although, by reason of an objection on the ground of the existence of incumbrances, no * conveyance had been executed * 305 to the company; and a similar decision was made by Lord CRANWORTH, in an unreported case of *Ex parte* Vicar of Feltham. The money must be considered as having been paid in under the 69th section, for the only other sections relating to the payment of money into Court are the 76th and 86th, neither of which is applicable to the present case.

Mr. Roll and *Mr. Bagshawe*, for the petitioner. — The earl's acceptance of the sum offered by the company, stipulated that the company should pay interest at 5*l.* per cent from the time of taking possession, a stipulation to which the company did not object till more than a year afterwards. They must be considered to have entered, therefore, into an agreement for payment of interest; and when, with reference to the proposed payment to Messrs. Masterman, pending the investigation of the title, the earl's solicitors suggested that the money had better be paid into Court, the proposal was of course one for merely substituting the Court for the bankers, and not otherwise interfering with the agreement between them. Nothing was said by the earl's solicitors about the 69th section, nor could Lord Hardwicke before his title was accepted, have properly presented the usual petition for investment and payment of the interest to himself. The interest is not payable under the 69th section until the title of the tenant for life is made out. The payment into Court must be considered as having been subject to the special stipulation between the parties as to interest, as was plainly stated by the letter of the 13th of July. The company must be considered to have adopted this view of the matter, never having objected to it till a year afterwards.

* *Mr. Wickens*, in reply. — The arguments for the re- * 306 spondent may be divided into two: first, that, upon the payment into Court, an agreement was entered into, giving it a differ-

ent character from that which belongs to such a proceeding in general; and, secondly, that the letter of the 13th of July, not having been replied to, constitutes a binding agreement on the part of the company to pay interest after the time at which payment otherwise would have ceased. Both of these arguments proceed on fallacies, for the letter of the 8th of May rejected the proposal contained in the letter to which it was an answer. With regard to the other argument, it is undoubtedly to be regretted that the company did not correct the mistake in the letter of the 13th of July; but to ascribe to this omission the force of an adoption of that mistake would be to give a greater effect than has ever been given to mere silence.

THE LORD JUSTICE LORD CRANWORTH.—I confess that I entertain some doubt in this case, whether we are doing quite right in exercising jurisdiction upon the matter in dispute even by the consent of the parties. Conceding that point, however, I think the order which has been made is right in the special circumstances of the case. The letter of the 13th of July, 1849, which was written just after the investment, and so near it as to be properly regarded as interpreting the intention of the parties, contains this passage: “We have thought it only proper to remind you that interest will be payable and required.” It is said that that was an erroneous view and an absurd construction to put upon the transaction; but as the vendor’s agents had made such a statement, and as no contradiction was offered by the company, and as their solici-
 * 307 tors when writing * a fortnight afterwards only stated that their engagements were so pressing that they could not make an appointment to examine the title-deeds, it was not unreasonable for the vendor to suppose that the company adopted his view, especially when negotiations went on for twelve months afterwards without any remonstrance being made. If the company had said at once what they said a year afterwards, that they did not agree in the vendor’s view of the case as to interest, they might have had good ground for their present argument. As they did not do so we think they rendered themselves liable to pay interest; and as the parties submit to the jurisdiction of the Court, we think that the order must be that they should pay interest accordingly.

* PRICE v. PRICE.

* 308

1852. January 30. Before the LORDS JUSTICES.

An illiterate person who could not write signed an instrument, purporting to grant all his property to his wife as her sole and absolute property, and shortly afterwards died. On a suit instituted by the wife, to have the husband's heir declared a trustee for her, *held*, that it was incumbent on the plaintiff to show that the grantor understood the nature of the instrument; and, as the evidence merely showed that the instrument had been read over to the grantor by an unprofessional person who had prepared it, and as to whose capacity to explain it there was no evidence, except such as rendered such capacity very doubtful, the bill was dismissed.¹

On the 8th of July 1849, the plaintiff's husband being seised in fee of a cottage and garden, signed a document in the following terms:—

"I hereby cerify (a) that I, George Price, collier, for and in consideration of the good will which I have towards my wife, have given and granted, and do hereby give and grant to the said Esther Price, in the presence of my uncle, Samuel Price, of the same place, all my land, house and chattels. And I declare that I have absolutely, and of my own accord, given and granted the same without any manner of condition to the aforesaid Elizabeth Price, and it is her sole and absolute property, henceforth and for ever."

It appeared that the only persons present when this document was signed were the grantor, his wife, his uncle, and a gentleman's servant who prepared the document, attested it, and read it over to the grantor, and was the only person present who could write.

The grantor died shortly afterwards, and his wife instituted the present suit to have it declared that the defendant, who was the grantor's heir-at-law, was a trustee of the house for her, and might be ordered to execute a conveyance. The case was heard by the * Master of the Rolls, who dismissed the bill. The * 309 plaintiff appealed from this decision.

Mr. Eddis, for the appellant, contended that although a husband could not, at law, convey to his wife, he might constitute himself in equity a trustee for her; and that the grantor in this case had effectually, though inartificially, done so. He proceeded to refer

(a) *Sic*.¹ See 2 Story Eq. Jur. § 793 b.

to *Ellis v. Nimmo*, (a) and *Kekewich v. Manning*; (b) but upon being requested by their Lordships to satisfy them in the first place that the effect of the instrument was fully explained to the grantor, he contended that, as the heir-at-law had not made out any case of insufficiency of information on the part of the grantor, and as there was no reason for supposing that the grantor had not acted voluntarily, or that the transaction was not a *bond fide* one, the Court must deal with it according to its legal import.

Mr. Sandys, for the respondent, was not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — Some questions of importance have been argued on the present occasion, which, in the view that we take of the case, it is not necessary to decide. We may assume, for the purpose, and only for the purpose, of the present argument, that the general law of the Court is such as it has been argued to be on behalf of the plaintiff.

Still, however, it is necessary that when a contract by way of gift, of so important a kind as the present, between husband and wife, is sought to be carried into execution by means of the * 310 interposition of this Court against the * husband or his estate, the Court should be satisfied that the husband well understood what he was doing.

The effect of the supposed contract is this: to give all that the husband had in the world to his wife for her separate use, absolutely and immediately; so as, upon his execution of the instrument, to leave it to her will and pleasure whether he should stay a day longer in his house, or be turned upon the community without any resource but his labour.

Now we are not satisfied that the effect of what this man was doing, was sufficiently explained to him. It was probably not absolutely necessary that a professional man should be present to give validity to the transaction; but before we assist in carrying it into execution, we ought to be satisfied that an illiterate person such as this well knew what he was about. It appears that there were only three persons present besides the wife when the instrument was signed; viz., the husband and his uncle, who are both dead, and the witness, of whom we know nothing, except that he

(a) Ll. & G., *temp.* Sug. 333.

(b) 1 De G., M. & G. 176.

was a gentleman's servant in the country, in Gloucestershire. It seems that he wrote the document and read it over to the grantor, and that neither the grantor nor his uncle could write. The witness could write in a certain way, but the third word in the document is misspelt. We are not satisfied that the witness was competent to explain the instrument to the husband, or that the husband understood its meaning or effect. Without, therefore, giving any opinion upon some questions that have been raised, we think that the case fails for want of proof.

* In the Matter of ELIZABETH SPENCER, deceased, and * 311
of the Trusts of the Will of ROBERT RAINE, and of the
TRUSTEE RELIEF ACT, 1849 (11 & 12 Vict. c. 96).

1852. January 31. Before the LORDS JUSTICES.

The personal estate of an intestate consisted of a reversionary share in the proceeds of trust property, which at her death was unsold, and situate within the jurisdiction of an Archdeaconry Court. Administration was not taken out to her till after the reversion had fallen into possession; the trust property had been sold, and the intestate's share had been paid into the Court of Chancery under the Trustees Relief Act. Letters of administration were then granted by the Archdeaconry Court. *Held*, that they were sufficient to entitle the administrator to payment of the share out of Court, and that a prerogative administration was not requisite.

THIS was a petition for payment out of Court of a sum of money paid in under the Trustee Relief Act.

Elizabeth Spencer was, at the time of her decease, in March, 1845, entitled to a reversionary interest, expectant on her mother's death, in one-fifth share in the leasehold estate, farming stock, and effects of a testator named Robert Raine, who died in 1829, having by his will bequeathed his tenant right in his farm and lands at Elmsthorpe in Lincolnshire, and all his personal estate, to two trustees, upon trust for payment of the income to his widow for her life, and after her death, and when his youngest child should attain twenty-one, for sale and distribution of the proceeds among the testator's five children, of whom Elizabeth Spencer was one.

At the time of the death of Elizabeth Spencer, the widow was

living, and the personal estate of the testator remained unconverted, and locally situate within the jurisdiction of the Archdeaconry Court of Leicester; and Elizabeth Spencer had no other personal estate, except her interest under the testator's will.

The testator's youngest child attained twenty-one in * 312 * May, 1848, whereupon, the widow having died, the trustees of the will converted the testator's personal estate into money, and there being, at that time, no personal representative of Mrs. Spencer, they paid her share into the Court of Chancery under the 11 & 12 Vict. c. 96.

Administration to Elizabeth Spencer was then granted to the petitioner out of the Archdeaconry Court; and he sought, by his petition, payment out of Court of her share, under Mr. Raine's will; but the Vice-Chancellor, Sir GEORGE TURNER, thought that he could not make the order for payment without prerogative letters of administration being taken out, and he desired that the case should be brought before the Appellate Court.

Mr. Bird, in support of the petition. — All the personal estate of the intestate was, at the time of her decease, locally situate within the jurisdiction of the peculiar. The change in its situation afterwards could not affect the question of the forum to which the administration of her property belonged. *Ex parte Knowles*, (a) *Scarth v. Bishop of London*, (b) *Williams on Executors*. (c) He also referred to *Druce v. Denison*, (d) and submitted that it was not an authority against granting the prayer of the petition.

THE LORD JUSTICE KNIGHT BRUCE. — Would it have made any difference if, after selling the testator's estate, his executor had gone with the proceeds into another diocese?

THE LORD JUSTICE LORD CRANWORTH. — Or suppose the goods wrongfully removed into another diocese.

* 313 * *Mr. Bird*. — I submit that the situation of the personal estate at the death of the deceased is the only criterion by which the forum to grant administration of the personal estate is to be determined.

(a) *Ante*, p. 60.

(b) 1 Hagg. 636.

(c) Page 257 (4th ed.).

(d) 15 Sim. 356.

THE LORD JUSTICE KNIGHT BRUCE.—In early times, before either the Metropolitan or the Ordinary was compellable to distribute the goods of an intestate, to which of them would the goods in such a case as this have belonged?

Mr. Bird.—It seems clear that the title could not have been affected by any thing that occurred after the death of the intestate.

THE LORD JUSTICE LORD CRANWORTH.—You have our authority to state to the Vice-Chancellor that we have given the subject our attention, and that, having also had occasion to consider a similar question in the late case of *Ex parte Knowles*, we have come to the conclusion that the archidiaconal letters were proper at the time of the death of Mrs. Spencer, and that, being so, they remain proper for all time, notwithstanding any subsequent change in the locality of the assets.

THE LORD JUSTICE KNIGHT BRUCE.—The decision in *Druce v. Denison* appears to have been this: If a testator, domiciled in London, die possessed of stock standing at the bank in his name, and a London probate is taken out, that will do in the absence of proof that there are goods also of the deceased in another diocese, inasmuch as stock, so far as it can be said to have locality, may be said to be in the diocese of London. It also decided what perhaps scarcely needed a decision, that it is not to be inferred * as a matter of course, that a man died possessed of goods * 314 in more than one diocese. I believe it to be settled that if a man dies in Carlisle, having no property but 3*l.* per cents, a Carlisle probate will not be correct.

THE LORD JUSTICE LORD CRANWORTH.—Independently of the course of practice, it might have been a question whether, if a person died, for example, in the diocese of Norwich, having no goods out of the diocese, except money in the 3*l.* per cents, that might not be considered as a simple contract debt, and so to follow him. But it has been long settled otherwise. If, however, after the death of a person, his money was invested, that circumstance does not, we think, render a prerogative administration necessary.

The title of the Ordinary is complete at the time of the death. Suppose that a stranger afterwards removes goods of the deceased

into a different diocese from that in which he died, and in which alone at the time of his death he had goods, could not an action of trover be maintained on a diocesan probate? The question always is, whether, at the death of the intestate, there are *bona notabilia* out of the diocese. On principle I should say that if, after the death, part of the assets are carried out of the diocese, and brought into the Bank of England, a Court of Law, in an action for the money, would hold the diocesan letters sufficient.

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* ZULUETA v. VINENT.¹

1851. November 3, 19. 1852. February 12. Before the Lord Chancellor
Lord TRURO.

In a case where A. had agreed to remit certain consignments to B., and B. had agreed to account with A. for the proceeds of such consignments: *Held*, that it was not competent at any time afterwards for B. to assert a paramount title to the proceeds of such consignments.²

THE question involved in the present appeal motions was, whether the plaintiffs, who were merchants in London, were entitled to an injunction to restrain the defendant, Antonio Vinent, a merchant in the island of Cuba, from prosecuting an action commenced by him against the plaintiffs, so far as it related to the recovery of the proceeds of the cargoes of two vessels, called the *Golconda* and the *Goldsmidt*, consigned by Vinent to the plaintiffs, and consisting of the copper ore raised from a certain mine called the *San José* mine, in the same island.

The injunction had been refused by the late Master of the Rolls (Lord LANGDALE) after the answer had been put in to the original bill. The plaintiff then amended his bill, and thereupon, before the defendant answered the amendments, applied again for an injunction before the present Master of the Rolls, who refused the application on the ground that he was absolutely bound by the decision of Lord LANGDALE, except so far as the case was varied by the amended bill, and that he did not consider that the amend-

¹ S. C., 3 M'N. & G. 246; 15 Beav. 272, 575.

² See 2 Smith Lead. Cas. (5th Am. ed.) 619 *et seq.*, 642 *et seq.*

ments varied the case made by the original bill sufficiently to entitle the plaintiff to an injunction.

The pleadings were very voluminous, but the only facts material for the purpose of the present report were the following. In and previously to the year 1846, certain parties who were the owners of the San José mine, employed Enrique Casamajor, a merchant in Cuba, as their *refaccionista*. The business of a *refaccionista*, according to the statement in the amended bill, was to * advance such sums of money as might from time to time * 316 be required for the working of the mine, or, in other words, to raise the ore at his own expense, and then to sell and dispose of the ore at his discretion; and out of the proceeds thereof to retain a certain commission to himself, and to repay himself the amount with interest thereon, and also such sums of money as he may advance to the owners employing him, and to account for the surplus proceeds to such owner. Bills of lading of cargoes of the ore were made out in the name of Casamajor, and he consigned the cargoes to the plaintiffs as factors or agents in this country, to dispose of the cargoes, and drew bills of exchange upon them in respect of the proceeds of the sale of those cargoes.

Upon the account between him (Casamajor) and the plaintiffs as such factors or agents, a large balance became due to the plaintiffs from the mine, or from Casamajor as such *refaccionista*. Casamajor became bankrupt in March, 1848, a large balance being at that time due to the plaintiffs in respect of the bills drawn by him, which they had paid, and of supplies sent out to the mine. Between that time and the month of August in the same year, the mine appeared to have been managed by the owners and by a person of the name of De Toledo. On the 5th of October in that year, the defendant sent a bill of lading of goods shipped on board the Golconda, to the plaintiffs, which ship arrived and delivered the goods to the plaintiffs in the following November and December; and the defendant also on the 3d January, 1849, sent to the plaintiffs a bill of lading of ores raised from the mine, and which had been shipped on board the Goldsmidt, which vessel arrived in the following month of April, when the goods were delivered to the plaintiffs, who subsequently sold the cargo and received the proceeds. The defendant having commenced an action * against them for the amount of the proceeds of such two * 317 cargoes, and for the balance of an account current, the

plaintiffs instituted the present suit to restrain him from prosecuting such action so far as related to the proceeds of such cargoes.

The plaintiffs claimed a right to apply the proceeds of the cargoes in satisfaction of the balance owing to them from Casamajor or the owners of the mine, on the following grounds: They stated in their amended bill that, according to the laws in force in the Island of Cuba, the *refaccionista* for the time being of any mine or share of a mine, was entitled by virtue of his office to a lien on the mine or a share of the mine and its produce, as a security for the money which he might advance for the purpose of working the mine or otherwise for the use of the parties to whom he acts as *refaccionista*; that he was also entitled and authorized to hypothecate or pledge to a third person the mine or shares of the mine and its future produce as a security for any money which such third party might advance to him in his character of *refaccionista* for the purpose of working the mine; that the mines in Cuba were generally worked by foreign capital, which was most commonly advanced by English houses; that by virtue of the laws of Cuba, and by the custom of trade in the island, where a foreign merchant advanced money to any proprietor or *refaccionista* of any mine, for the purpose of enabling him to work the mine, such foreign merchant acquired by such advance a lien upon the mine and its future proceeds, to the extent of the money so advanced, in the same manner as if the mine and its proceeds were expressly hypothecated or pledged to him by the proprietor or *refaccionista* thereof, and that in fact such foreign merchant was entitled to stand in the place of the proprietor or *refaccionista*,

and to hold the mine and its proceeds in pledge until the amount of his advance was repaid to him; that the plaintiffs in all their dealings with Casamajor fully relied on the aforesaid law of Cuba and custom of foreign trade, and that in accepting and paying his drafts they did not at all recognize him as a principal, nor look to his personal or individual security. And the plaintiffs charged that he advanced as *refaccionista*, that his advances as *refaccionista* to the owners of the mine were for the most part made with the plaintiffs' money, and that they acquired a lien upon the mine and its produce to the extent of their advances, and were to that extent entitled to stand in the place of Casamajor as the first creditor and incumbrancer upon the mine; and that long before the cargoes of the Golconda and the Gold-

smidt were placed at Vinent's disposal he was aware that there was a large balance due to the plaintiffs from Casamajor as *refaccionista*.

Two notices of motion having been given by the plaintiffs, the one for an injunction to stay proceedings at law until answer to the amended bill, the other that the injunction if obtained might be extended to stay trial; and the injunction having been refused by the Master of the Rolls, the motions were now renewed by way of appeal before the Lord Chancellor.

Mr. Roupell and *Mr. Shadwell*, in support of the appeal.

Mr. Lloyd and *Mr. Willcock*, contra.

Mr. Roupell, in reply.

1852. February 12.

THE LORD CHANCELLOR now delivered judgment, and after going through the facts of the case as above stated, proceeded as follows:—

* Numerous questions were raised in the pleadings and at * 319 the bar which it is not necessary to decide. Thus it is unnecessary for me to determine whether the plaintiffs are or are not precluded from having an injunction on the case made by the amended bill, on the ground that they ought to have inserted the matter in the original bill; or whether Casamajor was a mere agent of the mine owners or was a principal; or whether the rights of a *refaccionista*, and of a foreign merchant, are or are not such as the amended bill states, or whether the plaintiffs did or did not acquire such a lien as the bill charges; or whether the company called the San José Mining Company were entitled as against the plaintiffs to transfer the cargoes to the defendant; or whether the mine did or did not continue to be subject to the debts of the former owners; or whether the defendant, as a shareholder in and as president of the company or otherwise, had or had not notice of those debts; or whether the cargoes in question were procured with the money supplied by the plaintiffs, or with the money supplied by the defendant; or whether the law of Spanish mines is that persons who furnish the means of working a mine have precedence over prior creditors. It appears to me that

the merits of the present application depend upon grounds and considerations altogether independent of the numerous and complicated questions to which I have referred ; and the grounds of my determination will be the relation between the plaintiffs and defendant in respect of the cargoes in question, as created by the direct correspondence between them, and the contract which results from that correspondence.

The transactions between the plaintiffs and the defendant commenced in the beginning of 1847 by the defendant's consigning to the plaintiffs a cargo of copper for sale on his account ; * 320 other commercial transactions * of the same character took place between them of the nature of principal and factor, or principal and agent, the defendant drawing upon the plaintiffs in respect of his money in their hands. Incidentally that account connected itself with the San José mine. Up to the year 1848, the consignments of proceeds from that mine yielded a surplus, after satisfying the plaintiffs' claims ; and, by Casamajor's orders, such surplus was occasionally transferred to the defendant's credit in his private account with the plaintiffs. Casamajor failed in March, 1848 ; after which it became uncertain if the San José mine could be worked. The plaintiffs had chartered ships to fetch the expected cargoes ; and they apprehended being liable to dead freight. The relation between these parties, as well in reference to the defendant's other transactions with the plaintiffs as in connection with the proceeds of the cargoes in question, is to be ascertained from the answer of the defendant and from the correspondence.

His Lordship here referred to various passages in the answer and to the correspondence between the defendant and the plaintiffs, from the result of which it appeared that the bills of lading of the cargoes of the Golconda and Goldsmidt had been remitted to the plaintiffs by the defendant as shipper, and that they were so remitted to the plaintiffs as factors, to account with the defendant as such shipper. His Lordship then added : —

The question which arises is, Was the defendant induced by the plaintiffs to make advances for the purposes of the mine, in order that he might obtain the possession and control of the ores, with the view that they might be consigned to the plaintiffs upon the terms of the plaintiffs' accounting to him for the proceeds ?

* 321 If the defendant did make advances upon the inducement * of

the plaintiffs, and consigned the ores to the plaintiffs so obtained upon the faith of the plaintiffs' accounting to him, can the plaintiffs dispute the defendant's title to the proceeds upon the ground of rights which might have existed independently of that correspondence? The defendant would have been misled if the plaintiffs were at liberty to set up such rights; and by the defendant's conduct the plaintiffs have escaped paying dead freight, and got the profitable employment of the consignments.

I think that the defendant made the advances sworn to in the answer with the concurrence of the plaintiffs, in order to obtain possession of the ore, upon an agreement between the plaintiffs and defendant that the plaintiffs would account to the defendant for the proceeds of such ores as the defendant might consign to the plaintiffs; that the cargoes in question were consigned and received by the plaintiffs under that agreement; and that it is not open to the plaintiffs to dispute the defendant's title to the proceeds of such cargoes.

His Lordship, after referring to the case of *Dixon v. Hamond*, (a) and observing that it was a well-settled rule of law that an agent should not be allowed to dispute the title of his principal, concluded by saying, that, under the circumstances before mentioned, it was unnecessary to consider the numerous other points made on the part of the plaintiffs, as, assuming them all to be decided in the plaintiffs' favour, such decision could have no effect to impeach the defendant's right under the express agreement with reference to which the ores were consigned to the plaintiffs.

* In the Matter of JOHN WILLIAM BROWNE, one, &c. * 322

Ex parte FRANCES TRAPPITT JEFFERIES.

1852. February 14. Before the LORDS JUSTICES.

To constitute a case for taxation of costs after payment on the ground of undue pressure, the pressure must have been of such a kind as to have rendered it impossible or difficult to have the costs taxed before payment in the ordinary course. An unexplained delay of nine months after payment in the presenta

(a) 2 B. & A. 310.

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tion of a petition for taxation on such grounds held fatal to the application.¹

To support such a petition, on the ground of extravagant and improper charges, the allegations directed to that point must be specific, and must be such as to amount to evidence of fraud.²

THIS was an appeal from a decision of the Master of the Rolls, dismissing the petition of the appellant for the taxation of a bill of costs after payment.

The appellant had been appointed receiver in a cause of *Jefferies v. Jefferies*, which was instituted for the administration of her husband's estate. Her sureties were Augustus Pulsford Browne and Francis Mead, to whom she gave a counter security by assigning to them, by an indenture of the 2d June, 1845, her life interest in the dividends of a sum of 2000*l.* stock, and her right of dower in certain freehold estates of her late husband, upon trusts for indemnifying the sureties and paying all costs which they should be put to in respect of their having become sureties for her.

Notice of the counter security was given to the trustees of the fund, the life interest in which was assigned. The sureties also gave notice to the trustees not to part with the dividends; and the latter, in compliance with this request, retained the dividends in their hands.

On the 10th May, 1848, the sureties presented a petition in the cause of *Jefferies v. Jefferies*, praying that the appellant might be discharged from being receiver, and that the Master might
* 323 review a separate * report which he had made on the 31st January, 1848, finding a balance of 1795*l.* 13*s.* 4*d.* due from the appellant as receiver. This petition further prayed for a stop order against the transfer of any part of the trust funds in Court to the appellant, without notice to the sureties.

On this petition an order was made on the 22d July, 1848, enlarging the time for payment of a balance of 1196*l.* 8*s.* 11*d.*, which the appellant had been ordered by a former order to pay into Court, till three weeks after an order should have been made upon the hearing of the cause on further directions. It was further ordered that the appellant should be discharged from being receiver, and that no part of the trust fund should be transferred to her without

¹ See *Re Bayley*, 18 Beav. 415.

² *Ex parte Turner*, 5 De G., M. & G. 540; *Ex parte Walker*, 2 De G., F. & J. 105.

notice to the sureties, and that the rest of the petition should stand over till the hearing of the cause on further directions.

On the 6th June, 1849, the cause came on for hearing on further directions, with the above petition of the sureties, and a petition of the appellant; and it was then ordered that the Master should review his report of the 31st January, 1848, and should ascertain and state what was due from the receiver.

On the 8th December, 1849, the Master, by his report (which was confirmed), found that 180*l.* 15*s.* were due to the appellant as receiver in respect of the personal estate; and 255*l.* 14*s.* 5*d.*, due from her in respect of the real estate.

On the 20th December, 1849, an order was made on the motion of the appellant, discharging her from being receiver; and on the 24th January, 1850, on payment of the balance of 74*l.* 18*s.* 9*d.* due from her, into Court, the recognizances entered into by her and her sureties were vacated.

* On the 24th December, 1849, a copy of the order dis- * 324
charging the receiver was served on the sureties and on the trustees of the deed of counter security, with a request that the trust property comprised in that deed might be re-assigned to the appellant, and the withheld dividends paid to her. The sureties, however, declined complying with this request until their costs, charges, and expenses had been fully paid.

On the 12th January, 1850, a bill of the costs of Mr. John William Browne, the solicitor of the sureties, amounting to 84*l.* 0*s.* 10*d.*, was delivered by his town agents, Messrs. Clarke, Gray, & Woodcock, to the appellant.

On the 3d June, 1850, an order was made, on the hearing of the cause of *Jefferies v. Jefferies*, on further directions, which, amongst other things, referred it to the Taxing Master to tax the sureties their costs of the petition of the 10th May, 1848, and consequent thereon, and of their then application; and it was thereby ordered that Mr. Strange, a new receiver, who had been appointed in the place of the appellant, should pay to the sureties, in respect of the appellant's dower, one-third of the surplus rents and profits of the real estate accrued from the 6th April, 1848, on account of their costs when taxed until they should have been paid, and what the Master should certify to be the amount of their costs when taxed, without prejudice to the question by whom or out of what fund such costs were ultimately to be borne; and after such last-men-

tioned costs had been paid, it was ordered that the new receiver should pay one-third of the rents and profits of the appellant for her life in respect of her dower. This order had not yet been drawn up.

* 325 * On the 28th June, 1850, Mr. J. W. Browne's agents delivered to the appellant another bill of costs of Mr. J. W. Browne, amounting to 105*l.*, including the amount of the former bill delivered of 84*l.* 0*s.* 10*d.*

On the 12th August, 1850, the appellant gave to Mr. J. W. Browne's London agents an order upon the trustees of the fund in the following terms:—

“ 17, St. Peters Square, Hammersmith,
“ 12th August, 1850.

“ Gentlemen,— In compliance with the request of your solicitor, Mr. Raimondi, I authorize and request you out of my dividends in your hands, to pay to Messrs. Clarke, Gray, & Woodcock the sum of 105*l.*, being the amount of their costs claimed against me on behalf of Messrs. Mead & Browne.

“ Yours; &c.

“ F. T. JEFFERIES.”

In compliance with this order, Mr. Biggs, one of the trustees, out of the dividends in his hands belonging to the appellant, paid by check 105*l.* to Mr. Browne's agents, on the 14th August, 1850, in satisfaction of their bill of costs of that amount.

About this time, but whether before or after payment was a question which was the subject of conflicting testimony, a notice was served on Mr. J. W. Browne's agents, which was as follows:—

“ Gentlemen,— In consequence of my having been compelled to pay your demands for costs amounting to the several sums of 28*l.* 0*s.* 8*d.* and 105*l.* to enable me to perfect the deed of security to Mr. William Johnson, and to save me from the legal proceedings which the said William Johnson has threatened to
* 326 institute against * me, I hereby give you notice that notwithstanding the payment of the costs in question I dispute your right to charge the same against me, and that I shall as soon as possible apply to the Court of Chancery on the subject. Consequently I require you to retain the said sums of 28*l.* 0*s.* 8*d.* and

105*l.* until an order can be obtained in respect thereof, such payments being made under protest and without prejudice to my rights.

“Dated the 12th August, 1850.

“F. T. JEFFERIES.”

On the 7th June, 1851, the appellant presented her present petition for taxation of Mr. J. W. Browne's bill.

The petition and the affidavits in support of it stated the delivery of the bill for 84*l.* 0*s.* 10*d.* in January, 1850, and that the petitioner was advised not to pay it, as well on account of the extravagant and improper charges in it, as because she was not liable to pay it. They further stated that on the 4th of July, 1850, after the delivery of the bill of June, 1850, Mr. Smith, the appellant's solicitor, had an interview with one of Mr. J. W. Browne's agents; and that in this interview the appellant, through her solicitor, complained of the improper and excessive charges contained in this bill, and gave notice that it was her intention to have the bill taxed as soon as possible, and that she insisted upon having her dividends and dower released from the trusts of the deed of the 2d June, 1845; that in such conversation, Mr. Smith explained that it would be a saving of time and expense to have the bill taxed under a common Rolls' order, inasmuch as the order of the 3d June, 1850, on further directions, when drawn up would only entitle Mr. J. W. Browne to have the bill taxed as between party and party; whereas his agents insisted that he was entitled to be paid the costs, charges, and expenses which the sureties had incurred, thereby involving the parties in the unnecessary expense * of two * 327 taxations, unless the mode suggested by Mr. Smith was adopted; that at such interview Mr. Browne's agent was also informed of a judgment, which the appellant had been compelled to give to Mr. William Johnson, being that mentioned in her letter dated the 12th of August, and on which she would be exposed to the serious consequences of execution, unless the sureties released her dividends and dower forthwith. The petition and affidavits further alleged that Mr. Browne's agents thereupon consented to have the bill taxed under the usual Rolls' order, instead of that of the 3d June, 1850, and to allow the costs of Mr. Raimondi, the solicitor of the trustees of the fund, to be taxed under the same order, if practicable, but that, on the following day, they

wrote a letter, retracting their assent to the bill being taxed under a Rolls' order, unless upon the terms of Mr. Browne not in any event paying the costs of taxation, as he would not be liable to pay these under the order in the cause. The petition set forth a correspondence between the solicitors on this point, in which Mr. Browne's agents declined, unless upon the proposed terms, consenting to any order for taxation, except that contained in the order in the cause, which was not drawn up. The petition, and the affidavits in support of it, further stated that, on the 6th August, 1850, the appellant's solicitor received a letter from the solicitor of William Johnson, the judgment creditor, threatening to take immediate proceedings to compel payment of his judgment debt; and that, immediately after the receipt of this letter, the appellant's solicitor gave notice thereof to Mr. Browne's agents, and again required their clients to release the dividends and dower in order that the proceedings against her on Mr. Johnson's judgment might be prevented; but that Mr. Browne's agents * 328 again refused to comply with this request, unless the * costs of the sureties were first paid; and that the appellant, as the only means of saving herself from being taken in execution, consented to the payment of the 105*l.* out of the dividends then in the hands of the trustees. That, on the 20th May, 1851, Mr. Smith wrote to Mr. J. W. Browne's agents as follows:—

“*Re Mrs. Jefferies.*

“Dear Sirs,—It is my intention to tax the bill of costs of the sureties under the usual Rolls' order, which, on the 4th July last, you agreed to my doing; and, to avoid litigation, I have advised my client to pay the costs of taxation, in accordance with your requirement contained in your letter of the following day. I write without prejudice.”

That in reply to this letter, Mr. Browne's agents wrote as follows:—

“*Re Mrs. Jefferies.*

“23d May, 1851.

“Dear Sir,—We cannot consent to your taxing the bill of costs of the sureties under the common Rolls' order, such bill having been paid, and no protest made before payment. When we said in July last that such bill might be taxed under the usual Rolls'

order, that was under quite a different state of circumstances from the present. The bill had not then been paid, and Mrs. Jefferies had a perfect right to tax it. We consented to the taxation; but she never availed herself of it, and paid it without taxation."

The petition set out subsequent correspondence between the respective solicitors, and it prayed taxation in the usual way, but did not specify any items of excessive or improper charge.

* In opposition to the petition, Mr. Browne's agent by * 329 his affidavit expressly denied that he made any arrangement or came to any understanding with Mr. Smith that the payment of the bill of costs of 105*l.* should not prejudice or affect the right of the appellant to tax the bill, and he deposed that the contrary was the fact, and that had any such stipulation been attempted to be imposed upon him, he would not have accepted payment of the bill. He further deposed that Mr. Smith did not serve him with the notice of the 12th August, 1850, until after the bill of costs had been paid.

He also deposed that Mr. J. W. Browne had never agreed to the taxation under a common Rolls' order, except upon the terms above mentioned.

Mr. Roundell Palmer and Mr. Lovell, in support of the appeal. — In the case of *Re Elmslie (a)* taxation was ordered after payment, although the pressure arose from circumstances over which the solicitor had no control, and although the overcharges complained of were not great in amount. Lord LANGDALE there said, "Is it not pressure to say, under such circumstances, 'If you do not pay my bill of costs now, the whole matter shall be put off?' was it possible to avoid the inconvenience which must arise from the postponement, in any other manner than by payment of the bill? I think not. I think, therefore, that the bill was paid under pressure." *In re Wilkinson (b)* one of your Lordships held that pressure, although not improper on the part of the solicitor, was sufficient ground for taxation after payment, without reference to any question respecting exorbitance of charge.

* [THE LORD JUSTICE KNIGHT BRUCE. — Was the pressure * 330 there wholly collateral?]

(a) 12 Beav. 538.

(b) 2 Coll. 92.

It was occasioned by other persons than the solicitor whose bill was taxed. There was, in the present case, a protest against the bills; and the evidence shows that both parties proceeded throughout under the impression that the bills were to be taxed until May last, when the respondent first disavowed this understanding. *Re Elmslie* was cited to the Master of the Rolls, but not *Re Wilkinson*.

[THE LORD JUSTICE KNIGHT BRUCE. — Why was so long a time allowed to elapse from the payment to the presentation of the petition?]

The understanding that the bills were to be taxed, and that the only dispute was as to the costs of taxation as well as the desire to avoid expense, and the correspondence and negotiations between the solicitors, account sufficiently for this interval. As to the pressure having been only collateral, it is to be remembered that the word “pressure” does not occur in the Act; all that the Act prescribes is, that the special circumstances of the case should require the bill to be referred for taxation. Direct pressure is only a ground for taxation as one of such special circumstances.

They cited *Re Tryon*, (a) and, in answer to a question from Lord Justice KNIGHT BRUCE, said that the appellant was willing to bring into Court a sufficient sum to secure payment of the costs of taxation.

Mr. Bird, for the respondent. — The authorities conclusively establish that where pressure * is relied upon as a ground for taxation after payment, it must be shown to have been the direct pressure of the person claiming the payment, and that mere collateral pressure is not sufficient.

[THE LORD JUSTICE KNIGHT BRUCE. — If the question is simply whether the payment is made of the client’s free will, does not collateral pressure bear upon it as much as direct pressure?]

Even if there is direct pressure, the petition must point out some specific items of overcharge. *Re Harrison*, (b) *Re Thompson*. (c)

[The Lord Justice KNIGHT BRUCE asked if it was meant to be contended that, where an attorney had obtained payment of his

(a) 7 Beav. 496.

(b) 10 Beav. 57.

(c) 8 Beav. 237.

bill by a threat, for instance, of an indictment, taxation could not be obtained without pointing out specific overcharges. His Lordship referred to *Ex parte Andrews*. (a)]

It is not necessary to carry the proposition so far, but the general rule is well established. Now, in this petition there is no allegation of any overcharge whatever, except such as may be implied from the statement that the petitioner was advised not to pay the bill, as well on account of the extravagant and improper charges in it, as because she was not liable to pay it. That, however, is not even a substantive general allegation of overcharge.

Mr. R. Palmer, in reply.

THE LORD JUSTICE LORD CRANWORTH. — I regret that I am obliged to come to the conclusion * that the order made * 332 at the Rolls is right. I do not controvert the proposition that mere pressure may give right to taxation after payment. It is not necessary to discuss that question, or whether *Re Wilkinson* was correctly decided; though I think that case was correctly decided. There was in *Ex parte Wilkinson* pressure in that sense in which alone it is a ground for taxation after payment of a bill; namely, pressure of such a sort that it was impossible, or at all events difficult, for the client to have the bill taxed in the ordinary way. There was no such pressure here. On the 12th January, 1850, the bill of costs was delivered to the extent of 8*l.* 0*s.* 10*d.* The rest of the bill amounted only to about 20*l.* Between January, 1850, and the end of June following, that portion of the bill was also delivered.

The appellant having thus received this compound bill, partly delivered in December and partly in June, on the 13th of August pays it, as it is said, under protest. There is, however, a great deal of discrepancy of testimony as to the time at which the protest was made.

I think the pressure which is shown to have here taken place, was not such as to warrant an order for taxation, as a matter of course, afterwards. But even if it were, I am reluctant to listen to a petitioner who, lying by from August, 1850, till June, 1851,

comes then for the first time to this Court for taxation. Mr. Palmer says that the delay was owing to a desire to avoid expense, and to the subsequent correspondence. But the correspondence did not begin till the 20th May, 1851. I think the Rolls' order right; and I come to that conclusion, even assuming that Mr.

Palmer had it in his power to show extravagant and im-
 * 333 proper charges in the *bill. And further I think, that in order to enable him so to do, any charges of that nature on which it was intended to rely ought to have been very specifically stated, and must have appeared to be such as to amount to "evidence of fraud." (a) I proceed upon the ground that even supposing impropriety and excess in the charges, still no sufficient excuse is stated to justify the omission on the part of the appellant to apply for a taxation of the bill within the ordinary time, especially as no application was made respecting the taxation till more than half a year after the payment.

THE LORD JUSTICE KNIGHT BRUCE. — As the order will be affirmed, it is not necessary that I should enter fully into the grounds of the doubt and difficulty which I feel upon the case; doubt and difficulty perhaps ill founded.

The Act says (b) that payment "shall in no case preclude the Court or Judge, to whom application shall be made, from referring such bill for taxation, if the special circumstances of the case shall, in the opinion of such Court or Judge, appear to require the same, upon such terms and conditions, and subject to such directions, as to such Court or Judge shall seem right, provided the application for such reference be made within twelve calendar months after payment." Here the application was made within twelve months after payment, although not speedily. The question therefore is, whether the special circumstances of the case require the bill to be referred for taxation. Now I am clearly of opinion that it would not be right to direct taxation, upon the application of
 * 334 * the petitioner, without the deposit of a sufficient sum to pay the costs of the taxation, if she should appear liable to pay them; a deposit which she is willing to make. But, so subject, I am not satisfied that (the payment of this money having been made under pressure, perhaps under strong pressure, although

(a) *Horlock v. Smith*, 2 M. & C. 520; *Cooke v. Setree*, 1 Ves. & B. 126.

(b) 6 & 7 Vict. c. 73, § 41.

not proceeding from the attorney who was paid, but of which he had notice), all the circumstances of the case taken together, are not sufficient to preserve or give to the petitioner a right to tax.

The view which I have taken is probably, however, erroneous ; and I own that I cannot feel much regret that litigation upon so small a matter should end here.

THE LORD JUSTICE LORD CRANWORTH. — I think that, as there is some degree of conflict in the authorities, there should be no costs.

Appeal dismissed, without costs.

* MILLER v. PRIDDON.

* 335

1852. February 16. Before the LORDS JUSTICES.

By a settlement, lands were assured to A. and B. upon certain trusts, with a power, in case they or either of them, or any trustee or trustees to be appointed under the power, should die or become unwilling to act, for the settlor, during his life, and after his decease, for the acting trustees or trustee for the time being, or for the executors or administrators of any surviving trustee to nominate any fit person or persons to supply the place of the trustees or trustee so dying or becoming unwilling to act. A. never executed the deed, nor acted. After A.'s death, B., being desirous of retiring, nominated C. to be a new trustee, and conveyed to C. all the trust estate. After B.'s death, on account of doubts as to the validity of this appointment, the executor of B. executed a deed, appointing C. and D. to be trustees of the settlement in the place of the original trustees ; and by the same deed, C. conveyed the property to the use of himself and D. They then sold the trust estate under a power of sale in the settlement. *Held*, that the survivor of the original trustees had not been guilty of a breach of trust in appointing only one new trustee, and that the two new trustees were well appointed, and had validly exercised the power of sale so as to exonerate the purchasers from responsibility.¹

The bill contained an allegation that the new trustee firstly appointed was, when the sales were made, the sole trustee of the settlement. *Semble*, that this allegation would not have precluded the plaintiff from insisting upon the invalidity of the appointment of that trustee, if the appointment had been invalid.

¹ See *Lewin Trusts* (5th Eng. ed.), 469, 470, 474 ; *Stones v. Rowton*, 17 Beav. 310 ; *Hill Trustees* (3d Am. ed.), 272-277 ; *The General Hospital v.*

THIS was a suit instituted by *cestuis que trustent* under a settlement against the existing trustee, the representative of former trustees, and against purchasers under a power of sale contained in the deed. The ground of complaint was an alleged breach of trust in the appointment of new trustees, which, it was alleged, invalidated the sales.

The settlement was dated the 30th October, 1813, and was made between William Priddon the elder, of the first part, William Priddon the younger and Edward Priddon, the two sons of William Priddon the elder, of the second part, and James Priddon and Thomas Story, of the third part. By it certain freehold and copyhold estates and leaseholds for lives were assured and covenanted to be surrendered respectively to James Priddon and Thomas Story, their heirs and assigns, upon trust that they, or the survivor of them, his heirs or assigns, should stand seised thereof, upon trust out of the rents, issues, and profits, to raise and pay an annuity

* 336 of * 200*l.* unto William Priddon the elder and his assigns, during his life, and upon further trust in case Mary, the wife of William Priddon the elder, should survive him, to pay thereout an annuity of 60*l.* unto Mary Priddon or her assigns during her life; and upon further trust, to pay an annuity of 20*l.* to Alice Milner, if she should survive William Priddon the elder, for her life for her separate use, without power of anticipation; and subject to the payment of these annuities, upon trust, after the decease of William Priddon the elder, to raise 1000*l.* and divide the same between or among all the children of Alice Milner, as and when they should respectively attain their ages of twenty-one, or be married. And subject, and without prejudice to the aforesaid trusts, upon trust for the said William Priddon the younger and Edward Priddon, in equal shares as tenants in common, their heirs and assigns absolutely for ever. And the settlement gave power to James Priddon and Thomas Story, or the survivor of them, his heirs or assigns, at the request of William Priddon the younger and Edward Priddon respectively, their respective heirs and assigns, to sell any part of the lands, and to convey, surrender, and assure the hereditaments so to be sold to the purchasers discharged from

Amory, 12 Pick. 445; Greene v. Borland, 4 Met. 330; Dixon v. Homer, 12 Cush. 41; Wilson v. Bennett, 5 De G. & S. 475; *In re Poole Bathurst's Estate*, 2 Sm. & Giff. 169; Welstead v. Colville, 28 Beav. 537. The case of Miller v. Priddon was distinguished in *Stones v. Rowton*, 15 Jur. 750.

the trusts; and the receipts of James Priddon and Thomas Story or the survivor of them, his heirs, executors, administrators, or assigns, or his or their agents, or agent were to be effectual discharges. And it was provided that, in case James Priddon and Thomas Story, or any of them, or any trustee or trustees appointed under the now-stating provision in their place, or the place of any of them, should die or become unwilling or unable to act in the trusts before the trusts should be fully executed and performed, then, and as often as the same should happen, it should be lawful for William Priddon the elder, during his life, and after his decease, for the acting trustees or * trustee for the time * 337 being under the settlement, or for the executors or administrators of any surviving trustee, to nominate any fit person or persons to supply the place or places of the trustee or trustees respectively so dying or becoming unwilling to act as aforesaid; and that, immediately after every such appointment, the trust estates and premises, stocks, or funds, should be respectively conveyed, surrendered, and assured, assigned or transferred, so and in such manner that the same might vest in such new trustee or trustees, jointly with the surviving or continuing trustee, or in such new trustee or trustees solely, as the case might require, subject to the trusts aforesaid, and such new trustee or trustees should have and exercise all the powers and authorities whatsoever thereinbefore contained, in the same manner to all intents and purposes as if he or they had been appointed a trustee or trustees by the settlement.

Thomas Story died in the year 1808, without ever having acted in the trusts of the settlement, or incurred any responsibility in respect thereof, leaving James Priddon, his co-trustee, him surviving.

By deeds of the 3d and 4th of November, 1820, the moiety of Edward Priddon in the settled estates was in consideration of 3000*l.* absolutely conveyed and assured to William Priddon the younger, his heirs and assigns.

William Priddon the elder, and Mary his wife, had both died.

Alice Milner, after the death of William Priddon the elder, applied to James Priddon for payment of her annuity of 20*l.*, when she was referred by him to William Priddon the younger for payment thereof; but William Priddon the younger neglected (as the bill alleged) to * pay the annuity, whereupon Alice * 338 Milner again applied for payment to James Priddon, who (as the bill alleged) capriciously declared that he would not act

any longer in the trusts of the said settlement, and that he would get rid of the said trusts, and for this purpose he applied to the defendant Robert Cooke, who consented to assume such trusteeship. In order to carry into effect this arrangement indentures of lease and release, dated respectively the 30th and 31st December, 1831, were executed.

The release recited that William Priddon the elder had never surrendered the copyhold premises comprised in the settlement to James Priddon and Thomas Story, or either of them, or to any other person; but that the same, on the death of William Priddon the elder, descended to and became vested in William Priddon the younger, as his eldest son and customary heir. It also recited, that, by the deaths of Mary Priddon and William Priddon the elder, the trusts of the said indenture of settlement had ceased, save and except as to the annuity of 20*l.* a year payable to Alice Milner for her life, and also save and except as to the raising and paying of the sum of 1000*l.* to her children. It further recited that James Priddon, the surviving trustee named in the settlement, was desirous of resigning and being discharged from the trusts thereof, and had, with the approbation of William Priddon the younger, nominated and appointed Robert Cooke as a fit and proper person to be appointed a trustee in the place and stead of him the said James Priddon; and that the said Robert Cooke had consented and agreed to accept the said trust, and to act in the execution thereof in the place and stead of James Priddon. The release then witnessed that for the considerations therein mentioned,

James Priddon, at the request and by the direction of William
* 339 Priddon * the younger, released, and William Priddon the younger confirmed, unto Robert Cooke, his heirs and assigns, such of the trust premises as consisted of freeholds and leaseholds for lives. It also contained a covenant for the surrender of the copyholds. And it was expressed to be declared and agreed by and between the parties thereto, and William Priddon the younger thereby expressly directed that Robert Cooke, his heirs and assigns, should stand possessed as well of the said hereditaments and premises, with their appurtenances, upon the trusts mentioned in the settlement, and subject thereto in trust for William Priddon the younger, his heirs and assigns, according to the different natures and qualities of the same hereditaments and premises respectively.

James Priddon died on the 13th of November, 1839, having made his will dated the 11th of April, 1834, whereof he appointed William Priddon, of Ryland, executor, who proved the will on the 1st of May, 1840.

In 1841, Robert Cooke sold parts of the trust estates for sums amounting to 8500*l.*, and on the occasion of the sales the solicitor of Cooke, the trustee, acted as the solicitor of two of the purchasers. An objection was taken on behalf of the purchasers to the power of Mr. Cooke to sell and to give discharges for the purchase-money, upon the ground that his appointment as a trustee of the settlement was not properly made.

In order to obviate this objection, a deed was executed dated the 25th of March, and was made between William Priddon, of Ryland, of the first part, William Priddon the younger, of the second part, Robert Cooke of the third part, Edward Holmes of the fourth part, and Robert Cooke and Edward Holmes of the fifth part. It recited among other things, that * doubts * 340 had arisen whether Robert Cooke was legally and effectually appointed a trustee under the indenture of release of the 31st of December, 1831, the same indenture of release containing a recital only, and not any actual appointment and that if such appointment could be construed as having been made under and by virtue of such recital, the said appointment would be defective, inasmuch as the same should have been made in the stead and place of James Priddon, the surviving trustee, and Thomas Story, the deceased trustee; and also that two trustees should have been appointed by James Priddon, the surviving trustee, pursuant to directions of the settlement. It also recited that the defendant, William Priddon of Ryland, as executor of James Priddon, the surviving trustee under the settlement, had, at the instance and request of William Priddon the younger, agreed, for the purpose of removing such doubts as aforesaid, to appoint Robert Cooke and Edward Holmes to be trustees of the recited settlement in the places and stead of James Priddon and Thomas Story, deceased, in the manner thereafter mentioned. The deed then witnessed that, under and by virtue and in exercise and execution of the power and authority to him the defendant, William Priddon of Ryland, as the executor of James Priddon, the surviving trustee named in the settlement for that purpose given by the same indenture, and of all other powers enabling him in that behalf, the defendant, William Priddon of Ryland, with the

consent and approbation of William Priddon the younger, thereby nominated and appointed Robert Cooke and Edward Holmes to be trustees to supply the places of James Priddon and Thomas Story, deceased, to act in the trusts of the settlement, or such of them as were then subsisting and capable of taking effect. The deed also

witnessed, that for the purpose of vesting the hereditaments

* 341 * in Robert Cooke and Edward Holmes, for the purposes of the settlement, Robert Cooke, with the consent of William Priddon the younger, thereby conveyed and released unto Edward Holmes, the hereditaments therein described; to hold the freehold closes to the use of Robert Cooke and Edward Holmes, their heirs and assigns, for ever, and to hold the leaseholds, hereditaments, and premises, with the appurtenances, to the use of Robert Cooke and Edward Holmes, their heirs and assigns, during the lives therein mentioned, upon and for the trusts and purposes thereafter declared concerning the same; and in further pursuance of the agreement William Priddon the younger, for himself, his heirs, executors, and administrators, covenanted to surrender the copyholds to the use of Cooke and Holmes. And it was thereby declared that Cooke and Holmes, their heirs and assigns, should stand seised and possessed as well of the freehold and leasehold lands, hereditaments, and premises, as also of the copyhold lands, hereditaments, and premises, upon the trusts of the settlement, and subject thereto in trust for William Priddon the younger, his heirs and assigns.

Robert Cooke had since died, and Ann Cooke, a defendant, was his legal personal representative.

Alice Milner had intermarried with J. Miller, and the bill was filed by her children against the representatives of James Priddon and of Robert Cooke, and also against Holmes and the purchasers. The bill stated that soon after the execution of the last-mentioned indenture, the several purchases were completed, and the purchase-moneys were paid over to Robert Cooke. It alleged that the appointment of Robert Cooke as sole trustee of the settlement, and

the conveyance and assurance made to him by the indentures of * the 30th and 31st days of December, 1831, constituted a breach of trust on the part of James Priddon, and rendered James Priddon liable for any loss which might accrue to the plaintiffs in consequence of the appointment and assurance. That the nomination by the defendant, William Priddon of Ryland,

of Edward Holmes to be a trustee of the settlement was wholly invalid; and that Robert Cooke, at the time of the completion of the purchases, was the sole trustee of the settlement, but was incompetent to exercise the power of selling the hereditaments and premises comprised in the settlement, or of giving a valid discharge for the purchase-moneys thereof, and that the freehold and leasehold hereditaments and premises after the completion of the purchases continued, and, as the plaintiffs still submitted, were still charged with the portion of 1000*l.* and interest. The bill further alleged that the defendants, the purchasers, had notice of the above circumstances, as to the appointment of Robert Cooke, and of Robert Cooke and Edward Holmes to be trustees of the settlement. The prayer was, that it might be declared that the freehold and leasehold estates vested in the defendants, the purchasers, were still liable to the payment of the sum of 1000*l.* and interest, and that a sufficient portion of the freehold and leasehold estates might be sold in order to raise the amount which should be found due to the plaintiffs, or such part of the amount as should not be satisfied by the proceeds of the copyhold estates, and for a receiver in the mean time, or otherwise that Edward Holmes might be decreed to pay personally; and that the defendants Ann Cooke, and William Priddon of Ryland, might be decreed to pay out of the assets of Robert Cooke and James Priddon respectively, received by them, the amount which might be found due to the plaintiffs.

The cause came on to be heard before the late Vice-Chancellor * of England, who dismissed the bill, as against the * 348 purchasers, with costs. The plaintiffs appealed from this decree.

The appeal came on to be heard before Lord COTTENHAM, when an objection was taken, that the plaintiffs had not shown themselves to be all the children of Alice Milner. A reference to the Master had been subsequently directed. (*a*)

The appeal now came on to be heard upon the merits.

Mr. Malins and *Mr. Borton*, in support of the appeal. — First, a trustee could not be well appointed by a mere recital. Next, it was a breach of trust to appoint only one trustee when there were

(*a*) See 1 Mac. & G. 689.

two vacancies in the trusteeship, and to convey all the trust estate to such one trustee. *Hulme v. Hulme*. (a) In the case of the *Earl of Lonsdale v. Beckett*, heard before one of your Lordships as Vice-Chancellor, (b) it was declared that the appointment of one trustee made by the survivor of three named in a will, on his own retirement, was invalid; and although one of the three had died in the testator's lifetime, the Court declined to appoint only two, without referring it to the Master to inquire whether it would be for the benefit of the parties that there should be only two trustees. A single trustee thus appointed in the place of two could not execute the powers.

[The Lord Justice KNIGHT BRUCE referred to Sugden on the Real Property Statutes, p. 412, note (o).]

* 344 * In *Meinertzhagen v. Davis* (c) the instrument was so expressed as to warrant a departure from the original number of trustees. At all events the appointment of Holmes was bad, for the surviving trustee, having parted with the trust estate, whether properly or improperly, was not a trustee at the time of his death, and therefore his executor could have no power to appoint a trustee. (d) The receipt of trust money by an unauthorized person, even if associated with one who has authority, can give no discharge. If Cooke and Holmes were well appointed, still the sale would be bad as having been made by Cooke alone.

Mr. Stuart and *Mr. Shapter*, for the defendant William Pridon, of Ryland, and also for two of the purchasers. First, the state of the pleadings precludes the plaintiff from obtaining the relief which he now seeks. The bill alleges that Cooke was the sole trustee, and that the money was paid to Cooke alone. It moreover alleges that Story never executed the deed or acted. Upon these allegations, it would appear, that the appointment of one new trustee was valid, for, in filling up the number of trustees, one who has disclaimed, or has never acted, is not to be reckoned,

(a) 2 M. & K. 682.

(b) Cor. V. C. KNIGHT BRUCE, May 22, 1850; see 19 L. J. Ch. 342. The case will also be reported in 4 De G. & S.

(c) 1 Coll. 335, and see the cases there cited.

(d) See *Warburton v. Sandys*, 14 Sim. 631.

as he has never been a trustee. The case would be the same as one where one of several trustees named in a will has died in the testator's lifetime, in which case he cannot be replaced under an ordinary power. *Walsh v. Gladstone.* (a) The plaintiff cannot now be allowed to make a different case, and to rely upon any invalidity in the appointment of Cooke.

* [THE LORD JUSTICE KNIGHT BRUCE. — The allegation * 345 relied upon seems a mere statement of matter of law, and does not appear sufficient to prevent the merits from being discussed.]

Whether, however, it is so stated in the bill or not, in fact Cooke was properly appointed, for his appointment was not expressed to be made in the room of two trustees, but in the place of James Priddon only. The other vacancy (if there was one) might have been afterwards supplied. *Corrie v. Byrom.* (b)

Mr. Rolt and Mr. Freeling, for the other purchasers. — Either Cooke was, from the beginning, a good trustee, or, at all events, he and Holmes were afterwards well appointed: In either view the power of sale was well exercised, for its exercise by Cooke would not be vitiated by his associating another with him in it, even if the other were not (as we submit he was) a good trustee. Nor was Cooke's receipt for the purchase-money the less his receipt, even though it should be considered that Holmes had unnecessarily concurred in it. (c)

[THE LORD JUSTICE KNIGHT BRUCE. — Assuming Cooke to have been properly appointed, was it not competent to make up the number of the trustees to the original number; viz., two? The appointment of Holmes had the concurrence of Cooke, as well as that of the executor of the surviving trustee.]

Mr. Malins, in reply. — If Cooke was well appointed, it was he and not * William Priddon of Ryland who ought * 346 to have appointed the new trustee.

(a) 14 Sim. 2; but see Sugd. on Real Property Statutes, 411.

(b) Hill on Trustees, 610.

(c) See Warburton v. Sandys, 14 Sim. 631.

THE LORD JUSTICE KNIGHT BRUCE. — Mr. Cooke executed a deed containing these recitals: [his Lordship read the recitals set out *ante*, p. 340]. By the witnessing part the executor appointed Mr. Holmes and Mr. Cooke to be new trustees; and then by the further witnessing part it is witnessed, that for the purpose of vesting the hereditaments in Robert Cooke and Edward Holmes, in pursuance and for the purposes of the recited indenture of release and settlement, Mr. Cooke, with the consent and approbation of William Priddon, releases the trust property to Mr. Holmes and his heirs, to the use of himself and Mr. Cooke, their heirs and assigns, for ever.

I think it would be *hæsis in literâ* to say that in such circumstances the appointment of Mr. Holmes was not valid.

THE LORD JUSTICE LORD CRANWORTH. — I am of the same opinion. Either the original appointment was good, in which case the second appointment completed the number of trustees; or it was bad, in which case there has been a good appointment by the executor of the surviving trustee.

Appeal dismissed with costs, as against the purchasers and the representative of the surviving trustee.

* 347 * In the Matter of THE LONDON AND BIRMINGHAM
EXTENSION, and NORTHAMPTON, DAVENTRY,
LEAMINGTON, AND WARWICK RAILWAY COMPANY,

AND

In the Matter of THE JOINT-STOCK COMPANIES WIND-
ING-UP ACTS, 1848 and 1849.

GAY'S CASE.

1852. February 12, 14, 17. Before the LORDS JUSTICES.

By the subscription contract of a provisionally registered railway company, giving the usual powers to the committee of management, the persons who were parties to the agreement of the third part, covenanted, that, in the event of the application to Parliament being unsuccessful, they would pay and dis-

charge all the costs and expenses which should have been incurred with a view to the formation of the undertaking, and all other costs and charges of every description of and incidental to the undertaking, such costs and charges to be assessed ratably on the sums subscribed by them respectively. On winding up the company under the Winding-up Acts, it was alleged on behalf of some of the contributories, that the managing committee had received, by means of the deposits, much more than sufficient for the payment of all necessary costs, charges, and expenses of every description, and had misapplied considerable sums. Proceedings were commenced before the Master to enforce payment from the members of the committee of the amount due from them; but it appeared from the affidavit of the official manager that it was not reasonably probable that any considerable sum would be realized by these proceedings. While they were in the course of prosecution, a call was made on the contributories who had executed the deed, ratably, to provide a fund for payment of the costs incurred by the official manager in the prosecution of a suit, and the defence of an action (both of which were undertaken with the sanction of the Master), and generally in winding up the company. *Held*, that the call had been properly made.¹

THIS was an appeal from an order of Vice-Chancellor PARKER, confirming an order made by the Master in winding up the above company, for a call of 1*l.* 13*s.* per share on the contributories in Class 1, in which class the appellant was included (less deposits paid on account), to provide a fund for the payment of the costs, charges, and expenses incurred in a suit instituted with the approbation of the Master, and in the defence of an * action, * 348 and also for payment of costs of winding up the company.

The facts of the case are stated in the report of the hearing before the Vice-Chancellor, (a) and may be thus recapitulated:—

The company was projected in the year 1845. In the month of August, 1845, a subscription contract was executed by all the persons who were comprised in Class 1, upon whom the call had been made, including the appellant. It contained the usual provisions, and also the following stipulation: “And the said several persons parties to these presents for themselves severally, and their several and respective heirs, executors, administrators and assigns, do hereby undertake and agree, that, in the event of the

(a) 5 De G. & S: 122.

¹ See 2 Lindley Partn. (Eng. ed. 1860) 1138, 1139, 1147, 1148; Preece and Evans's Case, 2 De G., M. & G. 374; *Ex parte* Woolmer, 2 De G., M. & G. 665; Mowatt and Elliott's Case, 3 De G., M. & G. 254, in which (pp. 266, 267) Gay's Case is distinguished; Greenwood's Case, 3 De G., M. & G. 459, 473; 2 Sm. & Giff. 95; Prichard's Case, 5 De G., M. & G. 484; Underwood's Case, 5 De G., M. & G. 677; *Ex parte* Mowatt, 1 Drew. 247.

intended application to Parliament not being successful, the said parties to these presents shall and will well and truly bear, pay, allow, and discharge all the costs and expenses which shall have been incurred, whether previously to or after the execution of these presents, in and about or with a view to the establishment or promotion of the said undertaking, whether in or about the making, obtaining, or completing of any surveys or estimates for the said railway, branches, and works, or any of them, or on account of any solicitor's charges, counsel's fees, and also the costs of or incidental to the preparing, applying for, soliciting or procuring any such Act as aforesaid, travelling expenses, and all other costs and charges of every description, incidental or preparatory to the proposed undertaking, all such expenses, costs, and charges, to be computed and assessed ratably on the sum or sums

* 349 *respectively subscribed by each of the said several persons parties to these presents."

With regard to a portion of the amount raised by the subscriptions and amounting to 10,000*l.*, it was alleged that the managing committee, in breach of trust, had applied it by way of deposit under an agreement entered into by some of the directors for the purchase of the Warwick and Birmingham, and the Warwick and Napton Canals.

The winding-up order was made in May, 1849. In June, 1849, the official manager was appointed. Claims had been brought in on behalf of creditors, and among others one for a balance of 4500*l.*, claimed by a Mr. Pritchard, who had been employed as surveyor and engineer by the managing committee. The Master had directed that Mr. Pritchard should bring his action against the official manager, and authorized the official manager to defend that action. That action had accordingly been commenced, the declaration had been delivered, and the official manager had been obliged to plead, and the action was in a state to be tried.

For the purpose of recovering back the 10,000*l.* received by the canal companies, a suit was instituted under the advice of counsel, (in which the Master concurred), not by the official manager himself, but by one of the contributories, as plaintiff, on an undertaking being given, with the Master's authority, that the contributory should be indemnified in respect to any costs he should be put to by reason of the suit. The suit was in the course of prosecution, and answers had been put in. To answer the expenses of these

proceedings, the official manager had only a sum of 10*l.* which was the small balance left in the hands of the bankers, with a sum * of 70*l.*, which had been paid to him in anticipation * 350 of calls by certain contributories to the company.

The call had been resisted on the grounds that the scripholders were not legally or equitably liable to pay the costs for which the call was made, and that the managing committee had received from the appellant and the other scripholders more than sufficient for payment of all demands, and ought to have been called on to make good the amount due from them.

To meet this case the official manager deposed, that the amount which he should be able to realize by proceedings against certain of the members of the managing committee of the company, for sums alleged to have been improperly expended by them, would be very trifling, and wholly insufficient to pay the costs, charges, and expenses of and incidental to the winding up of the company, a statement which was confirmed by the affidavit of Mr. William Newnham Charles Wright, who had been one of the solicitors for the company, and in such capacity and otherwise had become acquainted with the circumstances of many of the shareholders.

The Solicitor-General, Mr. Daniel, and Mr. Cole, in support of the appeal. — The liability of the appellant and the other contributories on this list to pay costs, is not a liability to strangers, but merely a liability under a contract with their own committee of management to indemnify the committee. Now the Winding-up Acts (a) only empower the Master to make calls on contributories for costs, so far as the contributories are liable at law or in equity to pay them. * There is no provision in the Act for * 351 the payment of any of the costs of winding up a company by any persons who have not made themselves at law or in equity liable to the payment. Much less do the Acts enable the Master to call for payment of costs from those who in equity ought to receive them. There is no legal liability whatever on the part of the appellant. No attempt has ever been made to subject a person who was merely a party to a subscription contract to the demands of a creditor. And there was no equitable liability except that to indemnify the committee, who are already much more than

(a) See 11 & 12 Vict. c. 45, § 83.

indemnified. There is therefore no case against the appellant within the Act. He was, perhaps, properly placed on the list of contributories, because it was possible that some claim for indemnity might have existed, and such a possibility has been held sufficient ground for inserting a name upon the list. The object of these Acts was to obviate the practical and technical inconveniences attending the prosecution of suits to wind up the affairs of partnerships consisting of many members, and not to change the liabilities of any one. Now what would be thought of calling upon a partner who was a party to such a suit to pay costs before it appeared that any thing was due from him?

[THE LORD JUSTICE KNIGHT BRUCE. — Is that argument consistent with the provision of the 59th section, that the official manager shall always be fully reimbursed and indemnified, if necessary, by calls on the contributories for all losses, costs, charges, damages, and expenses, without deduction, except such as have been improperly sustained or incurred?]

To construe that section consistently with the 83d, the contributories referred to must be construed to mean those who
 * 352 are liable to contribute to the particular * costs, charges, and expenses, in each case. Suppose a large amount was recovered against the official manager with respect to a transaction, in respect of which one class of contributories alone was concerned or liable. It cannot be contended that the costs relating to this should be borne by any other class. At all events, this clause only provides for reimbursement by calls, if necessary. Now, until it is shown that the managing committee cannot make good the sums due from them, the necessity of a general call is not made out. They referred to *Hunter's Case* (a) and *Gay's Case*, (b) before Vice-Chancellor KNIGHT BRUCE.

Mr. Bethell, Mr. Malins, and Mr. Swift, for the official manager:—The 59th section was introduced to meet such emergencies as the present. And no evidence has been adduced to show that any substantial result will be obtained by proceeding against those of the managing committee who are accessible. And at all events

(a) 1 Sim. N. S. 435.

(b) 5 De G. & S. 122.

some funds are necessary to take these proceedings and to reimburse the charges which the official manager has already incurred. The Master has approved of the proceedings in which large costs have been incurred, not on behalf of any one section of contributories, but on behalf of all ; and the proper course would have been to object when these proceedings were sanctioned, and not to wait until the official manager had incurred costs, and then to refuse to indemnify him. It is contended that the appellant is not liable to Mr. Pritchard or the creditors. But the question is not whether he is directly liable to the creditors. The question under these Acts is one of internal liability; and it is quite * suf- * 353 ficient, if as between himself and any other contributory, Mr. Gay is liable to bear part of Mr. Pritchard's demand. It cannot be denied that as between himself and other shareholders, Mr. Gay is thus liable in equity.

The Solicitor-General was heard in reply.

At the conclusion of the argument the case was ordered to stand over with liberty for each party to file affidavits as to the probability of recovering the sums alleged to be due from the members of the managing committee. On behalf of the official manager an affidavit was made by Mr. Wright, who had with his late partner been the solicitors to the company. Mr. Wright deposed that from the dissolution of the company in the early part of the year 1846, until very recently, he had been in constant communication with various persons, about fifteen in number, claiming to be creditors of the company, for sums amounting together to the sum of 15,000*l.* or thereabouts, with reference to obtaining payment of their respective claims upon the company ; and that he had also frequent occasion to confer with many of the members of the managing committee of the company upon the subject of such claims, and that he had, by such means and otherwise, become acquainted with the circumstances of nearly the whole of the said members as thereafter detailed ; and he further deposed that the several creditors who then claimed the sum of 15,000*l.* or thereabouts, as debts due from the company, had been unable to obtain payment of their said debts, by reason, as he believed, of the inability of the members to pay the same, or of the absence abroad of some of the members, or of the inability of the creditors to discover the addresses of others of

the said members. And he further deposed that the following * 354 was, as he believed, a true statement of the circumstances of all the members of the managing committee mentioned in the subscription contract of this company, so far as the same had come to his knowledge. As to four of the committee-men, he deposed to their being out of the jurisdiction of the Court. And he further deposed that proceedings were instituted by William Bromley Pritchard, the late engineer of this company, and a judgment recovered therein for the sum of 3000*l.*, against one of the members of the committee, whom he named ; but that he had been informed and believed the said William Bromley Pritchard had been unable to obtain payment of any portion of his demand pursuant to such judgment. And he further deposed that another of the said members of the committee, whom he named, had died, as he had been informed and believed, in France, where he had resided from the date of the dissolution of the said company up to the period of his death, and that his estate was then being administered in the Court of Chancery. And he further deposed that he was well acquainted with another of the members, whom he also named, and that the only address which he had been able to discover of this member was the Alfred Club, Albemarle Street, and that he had been frequently informed by him and by his solicitors that his income did not amount to 200*l.* per annum, and that he was quite unable to pay any portion of the debts of this company ; and that although actions had been commenced against him by creditors of this company, they had been unable to obtain payment of any portion of their demands from him, all which information the deponent believed to be true. With regard to another member, whom he named, he deposed that the goods of this member had been taken under a bill of sale, that execution had been issued against him, and that he had stated to the * 355 deponent that he had no means of paying any portion * of the debts of the company, and could not afford to employ a solicitor to represent him in a suit against the canal companies, which information the deponent believed to be true. The deponent proceeded to state in detail similar circumstances respecting the other members of the managing committee who were within the jurisdiction of the Court, except one, who had been sued by various creditors of the company, and had paid in discharge of the claims of those creditors more than the amount with which he

was charged in the proceedings before the Master ; and except another, who was not charged with any amount in the proceedings ; and a third, who had never acted as or accepted the office of director.

The appellant did not adduce any further evidence.

February 17.

The Lord Justice Lord CRANWORTH on this day delivered the judgment of the Court. After stating the facts, his Lordship said : —

The company never was completely registered, the scheme having proved abortive ; but the parties who subscribed the deed made deposits of 1*l.* 7*s.* 6*d.* per share, by means whereof a sum of 28,000*l.* and upwards came to the hands of the managing committee ; and Mr. Gay contends that if this sum had been duly applied, it would have been far more than sufficient to satisfy all those who have demands on the managing committee in respect of the expenditure which they were authorized to make in or towards the formation of the company ; and so he contends that he ought not to be called on for any further payment until the 28,000*l.* has been duly accounted for. His engagement, he says, did not make him responsible to any creditor of the managing committee. All he contracted to do was (as he contends), ratably * with * 356 the other subscribers, to put the committee in funds to enable them to fulfil their engagements, and this he says was more than done by means of the deposits.

Whether this is or is not the true effect of the deed it is not necessary for us to decide, for the question here is not a question with creditors, but a question as to how funds are to be procured for enabling the official manager to proceed in the discharge of his duties in winding up the affairs of this unformed company.

Now, though this company never was completely formed, yet in considering who are the parties who ought to contribute to the costs of winding up its concerns, it cannot escape notice that the persons on whom the call is made, namely, those who have executed the deed, are precisely those who will be benefited by the winding up, and will be benefited in the exact proportion in which they are called on to contribute, subject to any equities hereafter to be enforced among themselves, so that, for the purpose of this

winding up, these contributories may be regarded as if they constituted a regularly formed company; and in such a case the only reasonable course to be pursued is that every partner or contributory should contribute ratably according to the extent of his interest to the cost of realizing outstanding assets, whether by suit or otherwise, and to the other costs of winding up the affairs. Whether all or any part of these costs may eventually be thrown on any particular class or number of the contributories, in exoneration of the rest, is a question not at present ripe for decision; it is sufficient for us to say that the Master is satisfied, and as it would seem very reasonably satisfied, that this sum must by some means be raised in order to enable the official manager to do his duty. We * 357 think he had full power to * make the call on the principle on which he has made it; namely, ratably on all those who have executed the deed.

Though, however, he had this power, we agree in the argument addressed to us on behalf of Mr. Gay, that in the exercise of his discretion under the 103d section of the Winding-up Act, the Master ought not to make any call for costs on the general body of the contributories, if it appears, by the proceedings before him, that any of the contributories are indebted to the concern in sums which, if paid, would render the call unnecessary, and the parties so indebted are in circumstances making it reasonably probable that such sums could be recovered.

Now there is undoubtedly a very strong *prima facie* case for supposing that the managing committee (all of whom are contributories) are responsible for sums far exceeding the amount now to be raised for costs. But it was stated on behalf of the official manager that any attempt to realize these sums would be useless, by reason of the insolvency of the parties liable to pay them. On this point we gave leave to the official manager to file a further affidavit. This was accordingly done, and Mr. Gay's counsel not desiring time to answer it, we have considered its effect, and have come to the conclusion that it would be very unsafe to rely on any funds to be derived from the managing committee, as a substitute for this call. The circumstances of the parties to be charged seem to be so nearly desperate, that we think it was a reasonable and proper course for the Master to make the call in question, and Mr. Gay's motion must therefore be refused.

It is proper to add, that our decision does not conflict

* with *Hunter's Case*. (a) Here, all the parties made liable * 358 to the call are interested in the affairs to be wound up, and in respect of which the costs are incurred in exact proportion to the amount of the call; whereas in *Hunter's case*, it was impossible to say whether he had any interest whatever in the matters in respect of which the call for costs was made, or what was the relative liability of himself and the other contributories.

Neither does our present decision conflict with that (b) of my learned brother in July last, when he was Vice-Chancellor, discharging an order for a call made by the Master for the purpose (*inter alia*) of raising money for payment of creditors. The liability of the contributories towards creditors depends on principles very different from those which apply to the present case, where the sole object of the call is to obtain the funds necessary for winding up the concern. .

As we have proceeded in part on evidence not before the Master or the Vice-Chancellor, we shall not make Mr. Gay pay costs. His motion will simply be refused, and the official manager will have his costs out of the estate.

1852. February 18. Before the Lord Chancellor Lord TRURO.

A testator by his will gave to each person as a servant in his domestic establishment at the time of his decease a year's wages beyond what should be due to him or her for wages: *Held*, that a head gardener, who lived in one of the testator's cottages and was not dieted by the testator, was not entitled to a year's wages under the will.¹

The plaintiff's case was proved by a written document, as well as by the examination of a witness, who was also examined in chief by the defendants, and in the course of such examination referred to the document. The plaintiff relied upon the document before the Vice-Chancellor; but, on appeal before the Lord Chancellor, rested his case upon the examination of the witness only: *Held*, that it was competent for him to do so, and that the defendants' objection to the reception of this evidence as secondary could only be supported by his producing the written document.

(a) 1 Sim. N. S. 435.

(b) 5 De G. & S. 122.

¹ See *Blackwell v. Pennant*, 16 Jur. 420, 9 Hare, 551; *Vaughan v. Booth*, 16 Jur. 808; *Thrupp v. Collett*, 26 Beav. 147.

JOHN, Earl of Abergavenny, by his will, gave "to each person as a servant in my domestic establishment at the time of my decease a year's wages beyond what shall be due to him or her for wages." After the death of the earl, the present suit was instituted by the plaintiff, who was the earl's head gardener, claiming to be entitled to the legacy of a year's wages. The plaintiff had been hired by the year, but his wages were paid to him weekly. The Vice-Chancellor KNIGHT BRUCE, on the 6th May, 1850, made a decree in the plaintiff's favour. The defendants, the executors of the earl, now appealed to the Lord Chancellor.

Mr. Bethell and *Mr. Pitman*, for the plaintiff, in support of the decree. — They submitted that it was clear, that by the use of the word "domestic," the testator did not intend that his bounty should be restricted to such servants as were djeted within the house: *Townshend v. Windham*; (a) that in the case of *Bulling v. Ellice*, (b) a farm bailiff was held to come within the meaning of the term servant; and that in the case of *Nowlan v. Ablett*, (c) where a head gardener was engaged on an agreement that he

* 360 * should have yearly wages and a house to live in, and though the house was not under the roof or a part of the master's dwelling-house, yet he was held to be a menial requiring one month's warning.

Mr. Russell and *Mr. Torriano*, for the executors, in support of the appeal. — They contended that the expression "domestic" necessarily confined the bounty to those servants who were boarded in the testator's mansion-house; that the plaintiff being paid weekly, was sufficient of itself to exclude him from coming within the category of servants entitled to a year's wages: *Booth v. Dean*. (d) They also relied upon the fact that one of the attesting witnesses to the will filled the same situation which the plaintiff held at the death of the testator, the fair inference from which would be that the plaintiff never was intended to take a beneficial interest under the will.

Mr. Bethell, in reply.

THE LORD CHANCELLOR. — I regret I cannot arrive at the same

(a) 2 Vern. 546.

(b) 9 Jur. 936.

(c) 2 C. M. & R. 54.

(d) 1 M. & K. 560.

conclusion as that which has been come to by the Vice-Chancellor. For the purpose of ascertaining in what sense the testator used the expression "domestic establishment," it appears to me to be important to distinguish between a servant in the establishment and one out of the establishment, between what is called an in-door and an out-door servant; and I cannot but think that the testator had this very distinction in view. The mere fact of splitting up the plaintiff's yearly salary into weekly payments would not, in my opinion, have excluded him, but the construction which would include the plaintiff would * also include a game- * 361 keeper, or cowboy, which would clearly be not maintainable.

The case of *Nowlan v. Ablett (a)* related to the custom of giving a month's warning or a month's wages to servants generally, and it was there held that a gardener was a menial entitled to the benefit of the custom. The cases of *Townshend v. Windham, (b)* and *Bulling v. Ellice, (c)* are neither of them authorities which can be said to govern the present case, because of the absence in each of those cases of the word "domestic." In my opinion the word was introduced for the purpose of drawing a distinction between servants who were in the house not receiving board wages, and servants not boarding in the house and receiving proportionably higher wages; otherwise by including an out-door servant on board wages you would be giving him a vast deal more than those servants who were unquestionably within the scope and operation of the testator's bounty. The decree of the Vice-Chancellor must therefore be reversed.

At the suggestion of *Mr. Russell* the bill was dismissed, without costs.

In the course of the argument the following question arose. The hiring of the plaintiff was effected by means of a letter written by H. Gilbert, the late earl's agent, to the plaintiff, and signed by him: this letter contained a clause as to the payment of the plaintiff's wages weekly, which, on the authority of *Booth v. Dean, (d)* might have excluded him from being considered as a servant entitled to a year's wages. It was therefore deemed advisable for the plaintiff to prove the yearly * hiring by examining * 362 H. Gilbert in the cause. The letter evidencing the con-

(a) 2 C. M. & R. 54.

(c) 9 Jur. 936.

(b) 2 Vern. 546.

(d) 1 M. & K. 560.

tract was proved by the plaintiff as an exhibit, and was read on the hearing in the Court below; but the evidence of H. Gilbert was alone tendered by the plaintiff on the appeal. The defendants also examined H. Gilbert in chief, and in the course of such examination elicited that there was written evidence of the plaintiff's hiring.

It was objected by the defendants' counsel that H. Gilbert's evidence was inadmissible, and reference was made to a report of the cause in the Court below, where the letter was set forth. The plaintiff's counsel thereupon desired to withdraw the letter from the evidence.

The Lord Chancellor held that it was quite competent for the plaintiff to take this course; that if the defendants, whose was the natural custody of the letter, set up the written contract, they must prove it; and that in the absence of such written contract, the secondary evidence, which had been tendered, was clearly admissible.

1852. February 24. Before the LORDS JUSTICES.

By a settlement, family estates were vested in trustees, upon trusts to raise moneys towards the discharge of incumbrances: and, subject thereto, upon trust for a father for life, with remainder to his eldest son for life, without impeachment of waste, subject to a power thereafter given to the trustees, with remainder to the first and other sons of the son in tail male, with remainder to the heirs and assigns of the father in fee. The power given to the trustees was, that it should be lawful for them at any time or times thereafter, so long as there should be any mortgage upon the estates (but, after the death of the father, not without the consent of the son, if living, in writing), to sell timber upon the estates, and to apply the proceeds in discharge of the incumbrances: *Held*, that the power in the trustees to cut timber, so long as any mortgage debt remained, was paramount to any right in the son to cut timber.

Held also, that the power was not to any extent invalid as tending to perpetuity.

THIS was an appeal from the decision of the Vice-Chancellor PARKER, reported in 5 De Gex & Smale, 156, where the facts are fully stated. The following is the portion of them more particularly applicable to the questions discussed on appeal.

By an indenture dated the 20th of March, 1832, between Edward, then Earl of Oxford, since deceased, of the first part; Alfred, then Lord Harley, but now Earl of Oxford, of the second part; John Moore, of the third part; and the plaintiff Thomas Briggs, of the fourth part (being a declaration of trusts of family estates which had been already conveyed to trustees); it was agreed that certain contracts which had been entered into for sale of certain parts of the premises should be sold or mortgaged, and that a sum not exceeding 50,000*l.* should be raised towards liquidating the debts of the then earl; and, subject thereto, that an annuity of 600*l.* a year should be raised and payable to Alfred then Lord Harley; and after his decease, that the same annuity should be payable to Lady Harley; and, subject to the above trusts, the estates were to be held by the trustees during the life of the then earl upon trust, to pay the rents to him for his life for his own use; and it was declared that in case the said Alfred Lord Harley should *survive the said earl, then that the trustees * 364 and trustee should, subject to the above-stated trusts, stand seised or possessed of the said estates to the use of, or upon trust for, the said Lord Harley and his assigns for his life, without impeachment of waste, but subject to the power thereafter limited to the said trustees or trustee to fell timber and underwood growing on the said estates; and from and after the death of the said Alfred then Lord Harley in case he should survive the then earl, then upon trust to raise and pay an annuity of 600*l.* to Lady Harley, for her life; and after the decease of the survivor of the said then earl and Lord Harley, subject as aforesaid, upon trust for the first and other sons of Lord Harley successively in tail male, with an ultimate remainder in default of such issue to the said then Earl of Oxford, his heirs and assigns for ever. The indenture also contained a proviso, in the following terms: "Provided also, and it is hereby further agreed and declared, that it shall and may be lawful for the said trustees or the survivor of them, his executors or administrators, at any time or times hereafter, so long as there shall be any mortgage or mortgages, incumbrance or incumbrances subsisting upon the said hereditaments, or any part or parts thereof (but not, after the said earl's decease, without the consent of the said Alfred Lord Harley, if living, such consent to be signified in writing), to fell and cut, or cause to be fallen and cut, all or any of the timber and other trees and underwood, stand-

ing, growing, or being upon the said hereditaments, and to sell and dispose thereof, and to pay and apply the money to arise therefrom in or towards the liquidation or discharge of the subsisting mortgages or incumbrances, or of some or one of them.” And it was declared, that, in order to provide for the due payment of the interest of the several incumbrances which should for the time being be

subsisting upon the said estates, and of paying and applying
 * 365 the rents and profits thereof * according to the several interests of the parties interested therein for the time being, the then Earl of Oxford, Alfred, then Lord Harley, and John Moore, appointed the plaintiff, Thomas Briggs, generally to superintend the management of the said estates, and to receive the rents and profits in respect of the estates, and all moneys arising from the sale of timber and underwood on the said estates, and to give receipts for the same, and to apply the moneys so received according to the trusts of the deed, retaining an allowance of 1s. in the pound for his trouble in the management of the estates.

The questions discussed upon the appeal were :—

First, whether, according to the true construction of the above deed, the right of the eldest son to cut timber under the limitation to him for life without impeachment for waste, was controlled by the power given to the trustees to fell timber with his consent?

Secondly, whether the latter power was not invalid as tending to a perpetuity?

The former question had been decided in the affirmation by the Vice-Chancellor. The latter had not been raised before him, and his Honor had given no opinion upon it.

The case came on originally upon a motion for an injunction; but upon the appeal it was agreed that the affidavits should be treated as depositions, and the cause decided as if it had regularly come on to be heard.

The Solicitor-General, Mr. Bethell, and Mr. Toller supported the decision of the Vice-Chancellor.

* 366 * *Mr. Malins, Mr. Roundell Palmer, and Mr. Cole*, for the Earl of Oxford. — First, the circumstance that the trustees have only power to cut timber with the consent of the present earl shows that the power was intended to be subordinate to his

own right under the limitation to him for life, without impeachment of waste: otherwise in the event of the trustees not thinking it proper that timber should be cut for the purposes of the trusts, no timber could be cut at all.

Next, the trust as regards the timber is invalid as infringing the rule against perpetuities. For as was laid down by Sir J. WIGRAM, in *Ferrand v. Wilson*, (a) this estate must be treated in the same way as a timber estate, and as if the wood formed part of the profits, so far as regards trusts for accumulation. So treating it, there is here a trust which is to last as long as there is any incumbrance affecting the estate; that is to say, for an indefinite time, which may last longer than lives in being and twenty-one years afterwards. If the trust had been to receive the rents and profits of the estate, and accumulate them until they became sufficient to pay off all incumbrances which affected another estate, no question could have been raised as to its invalidity, and yet in substance it would have been the same trust as the present, so far as regards this point. In *Ferrand v. Wilson*, (a) there was a devise to the executors for twenty-one years, and subject thereto to two successive tenants for life, with the usual limitations to preserve contingent remainders, and successive remainders in tail to the children of the second tenant for life, with remainders over. The trusts of the term were to fell timber until all the testator's debts and pecuniary legacies were paid. And he gave his executors power, during and *after the determination of the term, until a *367 person entitled in tail or to some greater estate attained twenty-one, to fell timber and apply the proceeds in payment of his debts and legacies, and subject thereto in the purchase of other lands, with an interim trust for investment. The case is therefore very like the present, and Sir J. WIGRAM there held the trust as to the timber altogether void, for remoteness.

In addition to *Ferrand v. Wilson*, (a) they referred to and commented upon *Ware v. Polhill*, (b) *Lord Southampton v. Marquis of Hertford*, (c) *Davies v. Wescomb*, (d) *Boyce v. Hanning*, (e) *Bagshaw v. Spencer*, (g) *Ibbetson v. Ibbetson*, (h) *Waldo v. Waldo*, (i)

(a) 4 Hare, 344.

(b) 11 Ves. 257.

(c) 2 Ves. & B. 54.

(d) 2 Sim. 425.

(e) 2 Cro. & Jer. 334.

(g) 2 Atk. 570; 1 Ves. Sen. 142.

(h) 10 Sim. 495; 5 M. & C. 26.

(i) 7 Sim. 261; 12 Sim. 107.

Phillips v. Barlow, (a) *Browne v. Stoughton*, (b) *Cole v. Sewell*, (c) *Kekewich v. Marker*, (d) and 2 Sugden on Powers, 293.

THE LORD JUSTICE KNIGHT BRUCE. — On the question of construction we have not the least doubt. We are both clearly of opinion that the exemption of the life estate of the present Lord Oxford, from being impeachable of waste, is subject to a power exercisable only by the trustees, though not without his consent. The question being, in substance, whether, according to the true intention of the settlement, the timber growing on the * 368 estate is during his * Lordship's life to be applicable to his own purposes, or to relieve the inheritance from certain charges, we think that the latter is plainly the true construction. It is not necessary to rely upon the obvious argument that the contention of Lord Oxford goes to strike the parenthesis (if it is a parenthesis) out of the settlement, or to give it no operation. Independently of that observation, not necessarily conclusive, the intent is plain that the trustees were to have the power of cutting timber for the purpose of relieving the inheritance, not to be exercised without his consent. It has been suggested that Lord Oxford might wish to have timber cut, and that the trustees might maliciously or capriciously refuse to concur. When that case shall arise it will be time enough to consider it. The case probably would be one as to which I (speaking for myself alone) should feel no difficulty. The question as to this part of the argument now stands simply thus. Is that life estate which is stated in express terms to be subject to a certain power to be not subject to the power? We think this point not arguable. But one of us has a doubt upon the question of remoteness, and therefore that point must be further discussed.

THE LORD JUSTICE LORD CRANWORTH. — The only doubt suggested to my mind is, as to the distinction between this case and that before Vice-Chancellor WIGRAM which has been cited.

Mr. Bethell, in reply. — One important and sufficient distinction is, that in *Ferrand v. Wilson*, (e) the destination of the pro-

(a) 14 Sim. 263.

(b) 14 Sim. 369.

(c) 4 Dr. & War. 1; and see Sugd. on Real Property Statutes, p. 285; and Sugd. on Law of Property, 116.

(d) 3 Mac. & G. 311.

(e) 4 Hare, 344.

ceeds of the timber was not, as it is here, to relieve the estate itself from the incumbrances affecting it. Moreover, the * argument as to remoteness does not apply, when as in the * 369 present case the power may be destroyed by a disentailing deed. In the case relied upon Sir J. WIGRAM said: "I think the case of *Ware v. Polhill*, (a) and the principle of *Ibbetson v. Ibbetson*, (b) require this decision from me." The case of *Ferrand v. Wilson* lies therefore within the limits of *Ware v. Polhill*, and *Ibbetson v. Ibbetson*, and is only an authority so far as it falls within these limits. But if *Ware v. Polhill*, and *Ibbetson v. Ibbetson*, should be considered as supporting *Ferrand v. Wilson* (which may admit of doubt and is not now in question), they are no authorities for extending the doctrines stated in the last case to such a case as the present.

[The Lord Justice KNIGHT BRUCE referred to Mr. W. D. Lewis's supplement to his work on perpetuities as containing observations well worthy of attention upon the cases cited in the argument.]

THE LORD JUSTICE LORD CRANWORTH.—The doubt that I had has been removed. It was a doubt created in the course of the argument by the reasoning of Sir JAMES WIGRAM in *Ferrand v. Wilson*. Some of the expressions in the judgment in that case certainly have an aspect favourable to the view taken by the defendant; but I think there is a manifest distinction between the cases. If the law be not that a power is always good so far as perpetuity is concerned, if it is capable of being barred by a common recovery, or by that which is now equivalent to a common recovery, perhaps it is a matter of regret that that is not the state of the law. If there are any exceptions to that rule, I think they have created more embarrassment than is compensated for by any benefit which they have produced.

* It is not necessary to give any opinion as to whether * 370 *Ware v. Polhill* is right, or whether *Ferrand v. Wilson* can or not properly come within the same category. For supposing *Ware v. Polhill* to have been rightly decided, and *Ferrand v. Wilson* to have correctly followed it, still I think that those authorities are not applicable to this case.

(a) 11 Ves. 257.

(b) 10 Sim. 495; 5 M. & C. 26.

This is a case in which not only is the power capable of being barred by the act of the first tenant in tail, when he is in a condition which, in point of law, enables him to act at all, by his being of the age of twenty-one; but in which the power is one to be exercised solely by virtue of the contract between the parties to the settlement, a contract to this effect, that that which was a debt upon the estate should be liquidated in a particular mode. It appears to me that to whatever extent of time the operation of that contract extends, it is not a contract within the doctrine of perpetuity. The person who enjoys the estate has only to pay off the incumbrance, and there is an end of it. The present case, therefore, is materially distinguishable from those cited.

THE LORD JUSTICE KNIGHT BRUCE. — The equity of redemption of a wooded estate is settled, and those concerned in the matter agree that no person having a limited interest shall apply any of the wood to his own use until the *corpus* of the estate shall have been relieved from certain incumbrances. It seems certainly a very reasonable agreement. It has been said, however, that it is void, as trespassing upon the law of perpetuity. But the circumstance of the power being liable to destruction by the tenant in tail is of itself sufficient to preclude all objection, at least to a power of this description, on that ground. I think the plaintiff right.

1852. February 28. Before the LORDS JUSTICES.

A testator directed his trustees to raise a sum of money, the income of which would produce a clear income of 100*l.* per annum, and to invest it upon government or real securities, and pay an annuity of 100*l.* to a legatee; and he directed them to stand possessed of the fund so raised and the securities on which it should be invested, but subject to and charged with the annuity, on the same trusts as the residue; and he directed that, if the income of the trust fund should, from any cause or circumstance whatever, prove insufficient to answer the annuity, the deficiency should be made good out of the residue. The trustees invested a sum of 3500*l.* on a mortgage at 5*l.* per cent; and the annuitant, who was one of the trustees, assigned the annuity to a purchaser, by a deed reciting that the 3500*l.* was appropriated to answer it. He after-

wards was permitted by his co-trustees to call it in, and to misapply it. *Held*, first, that the recital in the assignment precluded the purchaser of the annuity from being heard to say that there had not been an effectual appropriation of a fund to answer it: Secondly, that the provision in the will as to the insufficiency of the fund did not apply to the case. Thirdly, that, although the legatee of the annuity was only one of the trustees of the will, the purchaser from him could take no part of the assets till his defalcation was made good.¹ Fourthly, that, on all these grounds, the purchaser of the annuity had no claim upon the residue.²

THIS was an appeal from the decision of the late Vice-Chancellor of England.

Hugh Herinshaw, by his will dated the 14th of December, 1829, devised to Thomas Sheffield, William Webb, and Thomas Herinshaw, his real estates upon trust for sale, and he directed that his trustees should stand possessed of the moneys to arise from the sales and of the securities to which the testator should be entitled at the time of his decease, and of the residue of his personal estate, upon trust after payment of his debts, funeral and testamentary expenses, to levy and raise a sum of money, the clear yearly dividends, interest, and produce of which, when invested as thereafter was mentioned, would amount to or produce the clear annual sum of 100*l.*, clear of all deductions and abatements whatsoever; and should lay out and invest the said sum of money so to be raised and levied in their or his names or name, in the purchase of a competent share or competent * shares of the * 372 parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England, and should, from time to time, alter and vary the said stocks, funds, and securities, as to them or him should seem reasonable, and should pay the dividends, interest, and annual produce of the said last-mentioned trust moneys, and the stocks or securities in or upon which the same should and might from time to time be laid out and invested, or permit the same to be received by the said testator's son-in-law, William Webb, and his assigns, for his and their own proper use and benefit, for his life: and the testator thereby directed that if, at any time, the dividends, and interest, and

¹ *Belknap v. Belknap*, 5 Allen, 468.

² *Lewin Trusts* (5th Eng. ed.), 497; *Clack v. Holland*, 19 Beav. 262; *Wilkins v. Sibley*, 4 Giff. 442; *Cole v. Muddle*, 10 Hare, 186; *Willes v. Greenhill*, 29 Beav. 376; *Irby v. Irby*, 25 Beav. 632; *Stephens v. Venables*, 30 Beav. 625.

annual produce of the said last-mentioned trust moneys, and the stocks, funds, and securities in or upon which the same should be laid out and invested, should, from any cause or circumstance whatsoever, prove insufficient to answer and satisfy the purpose aforesaid, his said trustees and the survivors or survivor of them, and the executors, administrators, and assigns of such survivor, should, by and out of the dividends and annual produce of the residue of the moneys which should come to his or their hands by the ways and means thereinbefore mentioned, raise such further sum or sums of money as should be sufficient to make good such deficiency, and pay and apply the same accordingly. And as to the residue and surplus of the moneys which should come to the hands of his said trustees, or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, by the ways and means aforesaid, after answering and satisfying the trusts and purposes thereinbefore declared concerning the same, the testator thereby declared that the trustees and the survivors or survivor of them, and the executors, administrators, or assigns of such survivor, should lay out and invest the same in their

* 373 or his names or name, upon * such stocks, funds, or securities as aforesaid, or permit the same or any part thereof to remain upon the securities on which the same should be found to be placed out at the time of his decease, and alter and vary the said stocks, funds, and securities, from time to time, as to them or him should seem reasonable. And that they, the said Thomas Sheffield, William Webb, and Thomas Herinshaw, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, should stand and be possessed of and interested in the trust moneys, stocks, funds, and securities so to be appropriated for securing his said son-in-law, the said William Webb, the annuity intended to be provided for him as aforesaid, and of and in the interest, dividends, and annual produce thereof (but subject and charged with the payment of the said annuity), and also of and in all and singular the said trust moneys, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, upon the trusts thereafter mentioned; that was to say, in trust for such of his three grandchildren, the sons and daughter of the said William Webb, by his daughter, Elizabeth Webb, his then late wife deceased, as should be living when the youngest of the grandchildren for the time being should attain the

age of twenty-one years, to be divided between and amongst them, if more than one, in equal shares and proportions; and if but one, then the whole to that one.

The testator died in January, 1830, and his will and codicil were shortly afterwards proved by Thomas Sheffield, William Webb, and Thomas Herinshaw.

In October, 1831, Thomas Sheffield, William Webb, and Thomas Herinshaw advanced 3500*l.*, part of the residue of the personal estate of the testator, to one William Owen upon the security of freehold hereditaments, * which were conveyed to them * 374 by way of mortgage, by indentures of lease and release, of the 30th and 31st of October, 1831.

The annuity of 100*l.* bequeathed to William Webb, was paid by Thomas Sheffield, William Webb, and Thomas Herinshaw, up to the time of the death of Thomas Herinshaw.

Thomas Herinshaw died on the 5th of November, 1831, and after his death the annuity sum was paid by Thomas Sheffield and William Webb, the then surviving trustees of the will, in like manner, up to the 2d of January, 1832, inclusive.

In January, 1832, the plaintiff purchased of W. Webb the annuity, and all future payments thereof, for 900*l.*

The purchase was carried into effect by an assignment of the 28th day of June, made between William Webb of the one part, and the plaintiff of the other part. This deed recited that in pursuance of the trusts of the will, and for the purpose of securing the annuity thereby given to William Webb and his assigns, during his life, they, the said Thomas Sheffield, William Webb, and Thomas Herinshaw, shortly after the testator's decease, raised by sale or otherwise of his real and personal estate the sum of 3500*l.*, and that in further pursuance of such trusts and directions as aforesaid, they had invested the same at interest upon the security of the mortgage effected by the deeds of the 30th or 31st of October, 1831. And it further recited the death of Thomas Herinshaw, and that no other trustee had been appointed in his place, and that Thomas Sheffield and William Webb were then the only trustees of the will. The operative part was an assignment in the usual form. * And it contained a direction * 375 by William Webb to the trustees or trustee for the time being of the will, to pay the annuity to the plaintiff, his executors, administrators, or assigns.

The recital in the assignment of the 28th of June, 1832, that William Webb and Thomas Sheffield were then the only trustees of the will of the testator was erroneous, a new trustee, named Matthew Webb, having been appointed to be a trustee in the place of Thomas Herinshaw, deceased, and the trust property having been by indentures of the 27th and 28th of June, 1832, vested in him, together with Thomas Sheffield and William Webb, upon the trusts of the will.

William Webb was the chief acting trustee of the will, and with the privity and by the permission of Thomas Sheffield and Matthew Webb, his co-trustees, all or the greater part of the interest, dividends and annual produce of the testator's residuary estate, including the interest of the mortgage debt of 3500*l.*, was received by him or passed through his hands, and he with the privity and by the permission of Thomas Sheffield and Matthew Webb, from time to time paid to the plaintiff the annuity up to the 2d of June, 1846, inclusive, which was so paid (as the defendants alleged) out of the interest of the mortgage debt of 3500*l.*, that fund having been, as they alleged, set apart or appropriated for that purpose.

In the year 1843, William Owen being desirous of paying off the mortgage gave the usual notice of his intention so to do to Thomas Sheffield and William Webb as the surviving mortgagees named in the mortgage, and at the expiration of such notice, and without notice that the mortgage debt and securities had been transferred to Thomas Sheffield, William Webb, and Mat-
 * 376 thew Webb, * he paid the mortgage debt to William Webb and Thomas Sheffield, who thereupon reconveyed to him the mortgaged hereditaments, and signed a receipt (which was indorsed upon the reconveyance) for the mortgage money. It appeared that Thomas Sheffield had permitted William Webb to take possession of the sum, and to retain and apply it to his own purposes.

The bill prayed that Thomas Sheffield, William Webb, and Matthew Webb might be declared liable to make good the 3500*l.*, with interest, and for an account of the trust property; and that it might be declared that the plaintiff was entitled to have the 3500*l.* made good, or, in default thereof, to have a sufficient part of the remainder of the residuary estate of the testator set apart for that purpose, and that the arrears and future payments of the annuity might be satisfied and provided for accordingly.

The case was heard on the 11th June, 1850, before the Vice-Chancellor of England, who made a decree declaring that the defendant Matthew Webb was personally answerable to make good the 3500*l.* paid to William Webb, ordering payment of that sum into Court, and referring it to the Master to ascertain whether any and what personal estate of the testator remained outstanding, and whether any and what parts of his real estate remained unsold, and reserving further directions and costs.

Against this decree the defendants appealed, and the appeals (there were two) now came on to be heard.

Mr. Bacon and *Mr. T. H. Terrell* supported one of the appeals.

* *Mr. Malins* and *Mr. Metcalfe* the other.

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Mr. Bethell, *Mr. Rolt*, and *Mr. Speed* for the plaintiffs, the respondents. — There was no express appropriation of any fund in this case to answer the annuity, and it cannot be inferred that the mortgage debt of 3500*l.* was intended to be permanently appropriated for that purpose, since the income of it is considerably more than the amount of the annuity. But, even if it had been appropriated, the particular language of this will gives the annuitant a right to resort to the residue if, at any time, the dividends, interest, and annual produce of the trust fund should, from any cause or circumstance whatsoever, prove insufficient to answer and satisfy the annuity.

This will be attempted to be met on the other side by a claim to charge the defalcation upon the annuity itself, on the ground of its being bequeathed to the trustee who had made the default, and on the authority of *Morris v. Livie*. (a) But the cases are altogether distinguishable. In the first place, in *Morris v. Livie*, the interest of the trustee was a share in the residue; and one of the grounds of the decision was that neither he nor a purchaser from him could be heard to say that there was any residue so long as a particular legacy remained, through the default of the trustee, unprovided for. The judgment in that case begins thus: "The legacy of 6666*l.* 13*s.* 4*d.* consols, was a bequest prior and preferable to all the others now in question, those others in effect being

(a) 1 Y. & C. C. C. 380.

merely residuary. The claimants under them therefore cannot be considered as entitled to any thing, till after due provision made for the gift of consols." In the present case the subject

* 378 of the assignment is the preferable bequest, and * there is no decision that a particular legacy may not be assigned so as not to continue liable for subsequent conduct of the assignor, provided proper notice of the assignment has been given, as has here been the case. Moreover, in *Morris v. Livie*, the defendant was the sole trustee; and the purchaser of the share in the residue knew that he was buying from a person for whose defaults the interest purchased would be liable, and against whose defaults, owing to the circumstance of his being the sole trustee, the purchaser could have no security; whereas in this case the annuitant was one of three trustees, and, at the time of the purchase of the annuity by the plaintiff, there was nothing due from the vendor to the estate. The purchaser immediately gave notice of his purchase to the vendor's co-trustees, and they and the persons interested under the will knew that the annuity no longer belonged to the trustee, and that they could no longer look to it as a security for any thing that might become thereafter due from him to the trust estate.

[THE LORD JUSTICE KNIGHT BRUCE. — Suppose that a man had mortgaged an annuity to his bankers to secure a floating balance, and before any thing due to them sold the annuity, would not the security of the bankers for any debt subsequently incurred, at least before notice of the sale, prevail against the purchaser?]

Your Lordship in *Morris v. Livie* (a) observed with respect to the assignee in that case: "He must still have been aware that it remained in Mr. Livie's power to disappoint and destroy that appropriation. It may be argued that it was incumbent on the assignee, with a view to preserving his title from risk, to place the validity and effectual nature of the appropriation in a
* 379 state * free from uncertainty, by obtaining the consent of the persons interested in the stock legacy, or having it placed by some due course of proceeding in a position beyond the power of Mr. Livie. Mr. Livie, after his co-trustee's death, never

(a) 1 Y. & C. C. C. 388.

could have said that there had been a fair and effectual appropriation without having the fund forthcoming." Now the circumstance that there were other trustees in the present case, to whom notice was given, altogether excludes it from the scope of these observations, and effectually distinguishes the cases.

They referred to *Priddy v. Rose*, (a) *May v. Bennett*. (b)

THE LORD JUSTICE LORD CRANWORTH. — The decree appears to be wrong. The plaintiff claims as assignee of an annuity. This claim is resisted on several grounds, the first being that the annuity was satisfied by the appropriation of a fund to meet it. In answer to this, it is said that there was not, strictly speaking, any appropriation, because the debt of 3500*l.*, invested upon real securities, produced not 100*l.*, but 140*l.* per annum. It appears to us that this was perfectly immaterial. The trustees had power to invest the produce of the fund upon real security; and it is not often easy to find real security producing exactly a prescribed income, because a mortgagor does not in general wish to split the sum which he requires into different mortgages. From that circumstance it may be inferred that where, according to the terms of the trust, the fund to be provided to secure an annuity may be invested on real security, the security will not be an improper one, because it produces rather more than the actual annuity required. Therefore if there is nothing upon the will in the present case to denote a contrary *intention, this appropriation *380 may be inferred to have been proper. Now, the will confirms that inference, for it provides that the trustees shall stand possessed of the appropriated fund, "subject and charged with the payment of the said annuity," upon the trusts which it proceeds to declare. I do not build much on this expression, but it seems to show that the testator did contemplate the possibility of the fund being more than sufficient for keeping down the annuity.

This, therefore, appears to me an appropriation quite within the meaning of the will, if the executors intended it to be such an appropriation. Was it then so intended? That admits of no doubt. It was invested within a year and a half after the testator's death, and seems to have been invested for the sole purpose of

(a) 3 Mer. 86.

(b) 1 Russ. 370.

answering the annuity. And it must at all events be so taken as regards the plaintiff, because in the assignment of the annuity to him there is an express recital that this appropriation had been made, and therefore a recognition of it by him.

But in the next place it is said, that, although there may have been an appropriation, that circumstance does not exclude the right to resort to the residue, because, independently of the general question, there is in the will an express provision enabling the plaintiff to resort to the residue, and the provision relied upon is the following:—

[His Lordship read it.]

I think, however, this clause contemplates an original deficiency in the funds only to answer the annuity. The rate of interest on money in the funds had been reduced shortly before the
* 381 date of the will, and this circumstance * might have led to the introduction of the provision. It is said that, as the trustees misapplied the trust money, the contingency arose which the testator contemplated. My opinion clearly is, that the contingency has not arisen. The fund has, it is true, been lost, but it was ample, and the produce of it was never insufficient to answer the annuity.

I think, therefore, first, that there was an appropriation; and secondly, that there was no falling off in the produce of the fund, so as to render it insufficient within the meaning of the will.

But I also think that if all this were otherwise, still the case of *Morris v. Livie* (a) governs the present. Mr. Barnett, when he took his assignment, took it subject to the liability to the *cestuis que trustent* under the will. He has got all that he stipulated for. He bought an annuity, subject to a liability, and he cannot retain the benefit and transfer the liability to others.¹

THE LORD JUSTICE KNIGHT BRUCE.—I think that, consistently with the will, it was competent to the trustees and executors to appropriate for the annuity a fund producing an annual income

(a) 1 Y. & C. C. C. 380.

¹ See 3 Lead. Cas. in Eq. (3d Am. ed.) [677] 327, 369, in notes to *Row v. Dawson*, and *Ryall v. Rowles*, and cases cited; *Belknap v. Belknap*, 5 Allen, 468.

more than sufficient to keep down the annuity, paying of course the surplus from time to time, as long as there should be a surplus, to the persons entitled to the residue. That being the effect of the will, as to the power of the trustees, I am satisfied by the evidence that in fact a mortgage for 3500*l.* at 4*l.* per cent, on which a portion of the estate to that amount was invested, was effectually appropriated under the will to the purpose of satisfying the annuity; and I am of opinion that thereupon the * general * 382 residue became discharged, subject only to this observation, that it was possible that, by reduction of the rate of interest or variation of the security, the income of the 3500*l.* might be reduced below 100*l.*, in which case there might be a title to resort to the residue to supply the deficiency.

The loss in this case has been occasioned by no such circumstance. The whole sum was called in by the trustees, and has been spent and misapplied by them or some or one of them. I am of opinion that such an event is not a case contemplated by the will, is not one to which the language of the testator, properly interpreted, was intended to apply, or on which the provision was intended to come into operation.

But if it were otherwise, still there would remain the liability of the annuitant, who was also a trustee subject to account; and I am of opinion that it was incompetent to him, either for his own benefit, or for the benefit of a purchaser from him, to deliver the annuity from its liability as a guarantee for a full account on his part as to all the transactions in which he as a trustee should be engaged in respect of the trust. In any view of the case we come from the facts of it to the same result, though one view might create a difference in the form of the decree.

1852. March 2. July 12. Before the Lord Chancellor Lord ST. LEONARDS.

The annuity awarded to a country commissioner of bankrupts under the 58th section of the Act 5 & 6 Vict. c. 122, passes to his assignees on his insolvency, and does not fall within the cases of exception mentioned in the 56th section of the Act for the Relief of Insolvent Debtors, 1 & 2 Vict. c. 110.

Mode of proceeding to enable the assignee in insolvency to receive such an annuity when the insolvent refuses to make the requisite affidavit that he does not hold any office of emolument.

THE bill in this case was filed on the 17th November, 1847, by James Spooner, the assignee in insolvency of the estate of the defendant, Charles Henry Payne, against the said C. H. Payne, and Richard Clarke, the accountant in bankruptcy: it stated that at and previously to the passing of the Act 5 & 6 Vict. c. 122, intituled "An Act for the Amendment of the Law of Bankruptcy," the defendant, C. H. Payne, was a commissioner of bankrupts for the city of Bristol; that after the passing of the said Act, the Lords Commissioners of her Majesty's Treasury awarded to the said C. H. Payne an annuity of 199*l.* as a compensation for the loss sustained by him, by the abolition of the fees and emoluments accustomed to be received by him, and, by a certificate dated the 14th February, 1844, certified the amount of such annuity to the Lord Chancellor; (a) that, by an order made by the Lord Chancellor, dated the 28th July, 1844, the annuity was ordered to be paid to C. H. Payne accordingly, by the Accountant in Bankruptcy, out of "The Secretary of Bankrupts Compensation Account;" that on the 26th July, 1847, and for more than twenty-one days previously, C. H. Payne was and had been a prisoner in the Queen's Prison, in execution for debt, and that by an order made on that day by the Court for the Relief of Insolvent Debtors, on the petition of the plaintiff, the real and personal estate of C. H. Payne were vested in the provisional assignee, and by another * 384 order made * by the said Court on the 28th August, 1847, the plaintiff was duly appointed sole assignee of the estate and effects of C. H. Payne; that the annuity of 199*l.* had been duly paid to C. H. Payne, up to the 12th November, 1846, inclusive; that on the 12th November, 1847, another payment of the annuity became due, and that the plaintiff was advised that, as such assignee as aforesaid, he was entitled to receive the said sum and all future sums payable in respect of the annuity; that on the 10th November, 1847, the plaintiff presented his petition in bankruptcy to the Vice-Chancellor KNIGHT BRUCE, for payment accordingly, but his Honor dismissed such petition on the ground that he had no jurisdiction. (b) The bill prayed a declaration that the

(a) See 5 & 6 Vict. c. 122, § 58.

(b) See *Ex parte* Spooner, 1 De Gex, 575.

annuity had become and was vested in the plaintiff, as assignee of C. H. Payne ; that R. Clarke might be ordered to pay the same accordingly ; and an injunction against C. H. Payne and R. Clarke respectively.

The question thus raised depended on the effect to be given to the provisions of the 58th section of the statute 5 & 6 Vict. c. 122, above referred to, the certificate and order carrying out the same, the proceedings in the insolvency, and on the construction of the 56th section of the Act 1 & 2 Vict. c. 110.

By this last section it is provided, " That nothing in this Act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being or having been an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the service of her Majesty in the Customs or Excise or any civil office or other department whatever, or being or having been in the naval or military * service * 385 of the East India Company, or an officer or clerk or otherwise engaged in the service of the Court of Directors of the said company, or being otherwise in the enjoyment of any pension whatever under any department of her Majesty's government or from the said Court of Directors, to the pay, half-pay, salary, emoluments, or pension of any such prisoner for the purposes of this Act: Provided always, that it shall be lawful for the said Court to order such portion of the pay, half-pay, salary, emoluments, or pension of any such prisoner as on communication from the said Court to the Secretary at War, or the Lords Commissioners of the Admiralty, or the Commissioners of the Customs or Excise, or the chief officer of the department to which such prisoner may belong or have belonged, or under which such pay, half-pay, salary, emoluments, or pension may be enjoyed by such prisoner, or the said Court of Directors, he or they may respectively, under his or their hands, or under the hand of his or their chief secretary or other chief officer for the time being, consent to in writing, to be paid to such assignee or assignees in order that the same may be applied in payment of the debts of such prisoner ; and such order and consent being lodged in the office of her Majesty's Paymaster-General, or of the secretary of the said Court of Directors, or of any other officer or person appointed to pay or paying any such pay, half-pay, salary, emoluments, or pension, such portion of the said pay, half-pay, salary, emoluments, or pension, as shall be specified in such order

and consent, shall be paid to the said assignee or assignees until the said Court shall make order to the contrary."

The cause came on to be heard before the Vice-Chancellor KNIGHT BRUCE in July, 1848; and on the 5th August, his Honor * 386 made an order that a case should * be stated for the opinion of the Court of Exchequer on the following points: First, whether, upon the construction of the 5 & 6 Vict. c. 122, the certificate of the 14th February, 1844, under the hands of the Lords of the Treasury, the order of the then Lord Chancellor dated the 28th of February, 1844, the order of the Court for the Relief of Insolvent Debtors appointing a provisional assignee, and the above-mentioned order of the 28th of August, 1847, and upon the construction of the 1 & 2 Vict. c. 110, § 56,—the defendant, C. H. Payne, notwithstanding his insolvency, was still entitled to the annual sum of 199*l.* awarded to him by the said certificate of the 14th February, 1844, for such compensation as was therein mentioned. And, secondly, whether, upon the construction of the said Acts of Parliament, under the said certificate and orders, the said J. Spooner, as assignee of the said insolvent C. H. Payne, became entitled to the said annual sum of 199*l.* so awarded to the said insolvent as aforesaid, for such compensation as aforesaid.

Under this order a case was stated, which came on for hearing before the Court of Exchequer on the 28th May, 1849, when, after argument, the Judges certified as follows: First, that the defendant, C. H. Payne, is not still entitled to the annual sum of 199*l.* Secondly, that, under the Insolvent Act and the proceedings had therein, all the defendant C. H. Payne's right and title to the said annuity vested in the plaintiff as his assignee. (*a*)

On the 3d July, 1849, the cause came on to be heard for further directions on the certificate of the judges before the Vice-Chancellor KNIGHT BRUCE, when his Honor made a decree in * 387 favour of the plaintiff, declaring that * he was entitled to receive the payment then due, and the payments thereafter to accrue due in respect of the annuity of 199*l.* granted to the defendant C. H. Payne. A full report of the proceedings before the Vice-Chancellor, and also of an application subsequently made by the plaintiff to the Lord Chancellor, which it is not necessary further to notice, will be found in the second volume of Messrs. De Gex and Smale's Reports, page 439.

(*a*) See *Spooner v. Payne*, 18 L. J. Exch. 401.

The defendant, C. H. Payne, now appealed to the Lord Chancellor from the orders of the 5th August, 1848, and the 3d July, 1849.

Mr. Bacon and *Mr. Faber*, for the plaintiff, supported the decree appealed from.

Mr. Daniel and *Mr. Wright*, for the defendant. — They contended that it had always been the policy of the law to protect from assignment annuities or payments falling within the description of payments given to a man for future services, as, for instance, the half-pay and pay of an officer in the army: *Flarty v. Odum*, (a) *Lidderdale v. The Duke of Montrose*, (b) *Barwick v. Reade*; (c) that the annuity in question was of this character, being in compensation for the emoluments of an office held by the insolvent. They submitted that nothing passed to the assignee but what had the incidents of property (namely, perception and disposition), and that this annuity was a matter to which the party could not be said to have a title until the day of payment arrived, for he might have lost it by becoming the holder of an office of emolument; that further, the payment was made on an affidavit that he was not holding such an office, and it * was out of * 388 the power of the assignee to compel the insolvent to make such an affidavit, and there was no other which could be substituted in its place. (d) They relied on the 56th section of the Act 1 & 2 Vict. c. 110, and on the case of *Wells v. Foster*. (e) They cited also *Wood v. Griffith*, (g) *Ex parte Hastings*; (h) and referred to the Act 12 & 13 Vict. c. 106, § 57.

Mr. Bacon, in reply.

THE LORD CHANCELLOR. — I am clearly of opinion that the appeal in this cause cannot be sustained. The case is a very simple one. Mr. Payne was a country commissioner in bankruptcy; he became entitled to compensation; and that compensation was beyond all question properly vested in him, and, except

(a) 3 T. R. 681.

(b) 4 T. R. 248.

(c) 1 H. Black. 627.

(d) See *post*, p. 392.

(e) 8 M. & W. 149.

(g) 1 Swanst. 43, p. 54.

(h) 14 Ves. 182.

upon some special ground, either from the policy of the law or a condition imported into or implied in the grant, it would pass under the provisions of the Insolvent Debtors Act as a part of his estate; that is, unless the words of the section which has been referred to, take such property out of the general enactment.

In the first place it would seem clear that the principle acted on in *Wells v. Foster*, (a) cannot be applied to this case. The ground of that decision, of the propriety of which there can be no doubt, was, that there was a continued right to the service of the party who had the pension assigned to him, and that the Crown had a right to look to the continuance of the service in the person of the officer, in consideration of the payment of the sum of money which had been awarded to him; and the Vice-

* 389 * Chancellor, when the present case was originally before him, considered that it was affected by grounds of public policy of a like, though somewhat different nature; he thought that, as this particular compensation was to cease, either wholly or *pro tanto*, according to the amount of income which the party might in future acquire, and that as he might have an office conferred on him, the public, who were interested that the compensation should cease, had also an interest to this extent, that Mr. Payne's respectability should be kept up by means of this payment, so as to enable the Crown or the government to confer an office upon him. I do not, however, understand that his Honor persevered in or rather continued to express that opinion: on the contrary, I collect from what afterwards passed that he withdrew it; and my own impression strongly is that it cannot be maintained. The two cases do not stand upon the same ground, and will not, therefore, bear being treated in the same way.¹

It is then contended that this compensation cannot be assignable, because it has not the incidents of property. With regard to Mr. Payne it is said, that until the year has expired and he makes an affidavit that he has not an office and has not acquired an office, the money does not become payable, and is only payable when he has made the affidavit; and it is argued that as there is no mode of compelling the affidavit to be made, there is consequently no property which can be assigned. From the moment, however, when the grant was made, the compensation became

(a) 8 M. & W. 149.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1053.

property existing in Mr. Payne, property therefore to which he or his representatives will be entitled ; and although, in order to show that he has not forfeited the amount which is payable to him, he is to swear that he has not received from the Crown or the government certain other payments, this is simply * to * 390 verify the fact that the case has not occurred which is provided for by the condition annexed to the grant ; and if he were to die without proving it, the fact would be proved by some other evidence, in order to enable his representatives to receive the amount due. This is not varied by the fact that the property has passed to an assignee ; and, in my opinion, there is no condition attached to the grant which makes the property personal in Mr. Payne, nor which, although it may be a clog upon the enjoyment of it, can in any way prevent its alienation. Thus, supposing the fund to accumulate, and it should be found that the Court was unable to enforce the payment of it previously, still, on the death of Mr. Payne, the assignees would not be prevented from taking it, and other evidence than the affidavit of Mr. Payne himself would be admissible to show that he had not held any office. So also in the case of lunacy, Mr. Payne would not be deprived of the property, because he could no longer make the affidavit. Upon general principles, therefore, I should say that the property in question would pass to the assignee ; and looking at the provisions of the Insolvent Debtors Act, it would clearly do so, unless it falls within the exception mentioned in the particular section to which reference has been made.

[His Lordship then read the 56th section of the Act ; and after observing that Mr. Payne was not in the position of any of the parties there mentioned, proceeded as follows :]

The effect of this section is not to take the property mentioned out of the general operation of the statute, and make it depend upon the act of the debtor, whether the assignees shall be entitled to it or not ; but it provides for an application being made by the assignees, in the case of an officer for instance, to the parties representing the * government, who have power given to * 391 them to direct the half-pay to be duly apportioned between the officer and his creditors. It cannot therefore be supposed that a person in the situation of Mr. Payne, a country commissioner in

bankruptcy with 200*l.* a year compensation, is to set his creditors at defiance, and to claim the whole of the income, without making any contribution to his creditors, when persons of the highest grade in the military or naval service, although their half-pay is protected on the ground of public policy, are obliged to give up a portion of that half-pay to their creditors upon the award of a competent officer.

I am very clearly of opinion that the present case falls within the general provisions of the Insolvent Debtors Act, and that it is utterly impossible to include Mr. Payne within the exception of the 56th section. The consequence is that, the property being assignable as I have already stated, the assignee will be entitled to take it.

I may add that I have great difficulty in bringing myself to suppose that when this gentleman is made aware of the decision of the Court, he will put himself in opposition to the rights of his creditors, and will refuse to make that particular affidavit which, in form at least, is required in order to enable his assignee to get possession of the compensation awarded to him. I believe when he knows what the decree is, he will willingly give his assistance to enable the plaintiff to receive the fund in order to distribute it among the creditors.

The present petition must therefore be dismissed; but as the party sues in *formâ pauperis*, it cannot be dismissed with costs.

July 12.

* 392 * Mr. Payne having subsequently refused to make an affidavit to enable the assignee to receive the fund, the matter was again brought on before the Lord Chancellor. It then appeared that the affidavit was not, as had been previously assumed, required by the certificate of the Lords of the Treasury, but was only directed by the Lord Chancellor's order of the 28th July, 1844, which carried that certificate into effect.

The Lord Chancellor thereupon made an order varying that of the 28th July, 1844, so far as related to Mr. Payne, and enabling the assignee to receive the fund, — as to the existing accumulations, on an affidavit to be made by him stating that Mr. Payne had declined to make an affidavit, that the assignee had made inquiry, and that to the best of his belief the insolvent did not hold any office of emolument, — and as to future and accruing pay-

ments, on an affidavit to be on each occasion laid before and sanctioned by the Lord Chancellor without any formal petition : with liberty to the Accountant in Bankruptcy to apply.

* CHAPPELL *v.* REES.

* 393

1852. March 6. Before the Lord Chancellor Lord ST. LEONARDS.

A. B., on his marriage, settled certain estates then in mortgage on himself for life, with remainder to his first and other sons in tail, and covenanted against incumbrances : he afterwards mortgaged other estates, and became insolvent. A bill was filed by his assignee under the insolvency against the several incumbrancers on all the estates and against the tenant in tail, praying an account of what was due on the several incumbrances, that their priorities might be ascertained, and for a sale or redemption. A decree was made in the suit, directing that, on the plaintiff and defendant, the tenant in tail, paying what was due on the respective incumbrances, the unsettled estates should be conveyed to the party redeeming, and that the settled estates should be conveyed on the trusts of the settlement, and, in default of redemption, that the bill should be dismissed. *Held*, by the Lord Chancellor, that the decree for redemption, being permissive only as against the tenant in tail, was correct, and that a decree for a sale would have been improper.

The allowance of interest upon a legacy charged upon real estate, and due upwards of six years, is to be calculated from the filing of the bill, and not from the date of the decree, though the bill is not filed by the legatee.

THIS was an appeal by the defendant, Edward Richard Rees, against a decree of the late Vice-Chancellor WIGRAM, made on the 11th June, 1847, under the following circumstances : Edward Rees, the father of E. R. Rees, was seised of four real estates, which were devised to him, charged with a legacy of 800*l.* to Catharine Rees ; having mortgaged three of such estates, he, on the occasion of his marriage, made a settlement of the same three estates upon himself for life, with remainder to his first and other sons in tail, and covenanted against incumbrances ; he afterwards mortgaged the fourth of the devised estates, and then became insolvent. The present suit was instituted by the assignee under the insolvency against the various incumbrancers on the estate of E. Rees, and against E. R. Rees, the tenant in tail of the settled estates, and against C. Rees, the legatee. The bill prayed an account of what was due on the several incumbrances, and to have

their priorities ascertained, and that the extent to which the estate or interest of the defendant, E. R. Rees, in the settlement was subject to the several incumbrances, or any of them, might be ascertained and declared, and that the four estates, or such of them, or such estate or interest therein, as to the Court should seem * 394 meet, might * be sold, and the produce of such sale paid and divided between the several parties who should be found entitled thereto, or in case the Court should be of opinion that the plaintiff was not entitled to relief against the mortgagees or incumbrancers, except upon terms of redeeming them, then that he might be let in to redeem accordingly, and that upon payment by him of what should be found due, the mortgaged premises might be conveyed to him; and that the estate and interest of E. R. Rees in the hereditaments and premises comprised in the settlement might be made subject to such of the mortgages and incumbrances as should be ascertained to be chargeable thereon, and to such extent as the Court should direct, or that the amount which such estate and interest might be declared to be subject, might be raised and paid thereout, under the direction of the Court.

The Vice-Chancellor, after directing interest to be calculated on the legacy of 800*l.* from the end of one year after the death of the testator, referred it to the Master to take an account of what was due for principal and interest on the several incumbrances, and ordered, that upon the plaintiff and defendant, E. R. Rees, paying what was due for principal and interest and costs on the several incumbrances, the defendants were to release and convey the premises comprised in their several securities in manner following; that is to say, as to the estates not in settlement to the plaintiff and defendant, E. R. Rees, or the one who should redeem the same, and as to the estates comprised in the settlement, upon the trusts of the settlement, and that in default of the plaintiff and E. R. Rees, or either of them, so redeeming, that the plaintiff's bill should be dismissed with costs.

Mr. Rolt and *Mr. Shapter*, for the plaintiff, in support * 395 * of the decree, submitted that the defendant E. R. Rees could sustain no damage by the decree, as obtained in this suit, which did not make it imperative upon him to redeem, there being no foreclosure as in the case of *Hughes v. Williams*. (a)

(a) 3 Mac. & G. 683.

Mr. Chandless, for the defendant Henry Lawrence, the first incumbrancer on the estates not in settlement, supported the decree.

Mr. Pitman, for Richard Bowen Williams, a mortgagee of the settled estates whose mortgage was anterior to the date of the settlement.

Mr. Freeling, for Catharine Rees, the legatee, also supported the decree in so far as it gave her interest from one year after the death of the testator. He argued that the devise to Richard Rees, being subject to the payment of the legacy, created a trust, which brought the case within the principle of *Ward v. Arch*, (a) *Young v. Lord Waterpark*, (b) *Gough v. Bult*; (c) but—

The Lord Chancellor said that there was a settled distinction in equity between bequests amounting to mere charges upon an estate and those involving express trusts, and that in the present case the legacy could not be carried higher than a mere charge.

Mr. Stuart and *Mr. Terrell*, for the defendant, E. R. Rees, the appellant. — They relied upon the judgment of Lord TRURO in *Hughes v. Williams*, (d) and contended that the decree * of the Vice-Chancellor was erroneous in not ordering a * 396 sale of the unsettled estates. *Averall v. Wade*. (e)

Mr. Shapter, in reply. — The bill was framed on the authority of *Henley v. Stone*. (g)

THE LORD CHANCELLOR. — The decree appears to have done substantial justice between all parties, with the exception of that portion of it which relates to the allowance of interest upon the legacy for a period beyond six years from the filing of the bill, and in that respect, therefore, the decree must be corrected. The plaintiff on the record, in taking the estate of the insolvent, takes it subject to all equities to which it is liable. The insolvent, having by the settlement covenanted to relieve the settled estates from all incum-

(a) 12 Sim. 472.

(b) 13 Sim. 204.

(c) 17 Law J. Ch. 486.

(d) 3 Mac. & G. 683.

(e) Lloyd & G. 253.

(g) 3 Beav. 355.

branches created by him, could never have come into a Court of Equity to make the tenant in tail under that settlement contribute to the discharge of incumbrances subsequent to the date of the settlement. The effect in equity of such a covenant, as between the settlor and the parties beneficially interested under the settlement, was to throw all the debts of the insolvent on his unsettled estates. How far such an equity would bind third persons is not now to be considered; but the unsettled estates being so charged in exoneration of the settled estates, and the insolvent having afterwards incumbered those estates, the present suit was instituted by his assignee against the various incumbrancers and the tenant in tail, and it prayed in the alternative a sale of the estates. So far

as the bill prayed a sale it was a matter of course for the
 * 397 * Court to have refused the relief which was sought; but inasmuch as the decree contained a direction as to taking an account of incumbrances, the tenant in tail was properly enough kept before the Court, because if the accounts were taken behind his back they would not of course bind him, and the consequence might possibly be to impose upon him the necessity of filing another bill.

The ordinary method of enforcing redemption undoubtedly is by foreclosure, but a decree for redemption is not necessarily to be followed by foreclosure; and if the decree in the present suit had directed a foreclosure, the tenant in tail would have had just cause to complain of it, though he could only have been permitted to redeem upon the terms of paying off all the incumbrances. But the decree has not assumed that shape, for, with respect to the unsettled estate, it simply gives a right of redemption to the plaintiff and also to the tenant in tail; it is permissive only, and it provides that if the incumbrances on the settled estates should be discharged, they are not to be conveyed to the plaintiff, but to the uses of the settlement; the tenant in tail would thus have all that he was intended to have; namely, an estate tail discharged of all incumbrances subsequent to the date of the settlement. He is clearly not aggrieved by the decree; for if there is redemption he must have his costs, and if there is no redemption the bill must be dismissed with costs.

Mr. Chandless asked for the costs of *H. Lawrence* as against the appellant.

THE LORD CHANCELLOR.— You may have them as against the plaintiff and add them to your mortgage. I am of opinion that the appeal ought not to have been from the whole decree, * which alone has rendered it necessary for the other defend- * 398 ants to appear.¹

Mr. Stuart submitted that inasmuch as the bill was not filed by the legatee, the allowance of six years' interest should be calculated from the date of the decree.

The Lord Chancellor, however, decided that the calculation should be from the filing of the bill.

LETTS v. THE LONDON CORN EXCHANGE COMPANY.

1852. March 1, 2, 10. Before the Lord Chancellor Lord ST. LEONARDS.

The case of a money payment in lieu of tithes made upon an annual value is not like that of an ordinary composition, and it requires strong evidence to make out that such a payment is to be treated as a composition; and if the annual payment is less than the annual value, the mere circumstance of the receipt of the annual payment will not establish it as a composition.

Whether, assuming such a payment to be made and received as a composition, the same notice is necessary to determine the composition as is requisite in the case of one relating to a common render of tithes, *quære*.

Form of reference to the Master to ascertain the value of the London Corn Exchange in regard to its liability to tithe under the Act 37 Hen. 8, c. 12.

THIS was an appeal by the plaintiff from an order of the Vice-Chancellor KNIGHT BRUCE dated the 2d July, 1851, dismissing the bill without costs, and without prejudice to the filing of a new bill.

The plaintiff in the suit, the Rev. John Letts, was the rector of the parish of St. Olave Hart Street, in the city of London: the defendants were the London Corn Exchange Company, incorporated under an Act of Parliament, 7 Geo. 4, c. 55, intituled "An Act for erecting and providing a new Corn Exchange at or near Mark Lane in the city of London," and Mr. Weld Wren, the clerk and solicitor of the company. The bill, which was filed in July, 1848,

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 280, and note (4).

prayed a declaration that the plaintiff and his successors, as
 * 399 rectors of the parish, were entitled to * receive from the London Corn Exchange Company, in respect of the Corn Exchange and premises erected and built by them pursuant to their Act of Parliament, tithes, or annual sums by way of tithes, after the rate of 2s. 9d. in the pound upon the annual value of the said Corn Exchange and premises, and that the said annual value, and the yearly amount of tithes or annual sums in respect thereof, might be ascertained, and an account taken and payment ordered of what was due to the plaintiff for arrears in respect of the tithes and annual payments from Michaelmas, 1847, the plaintiff waiving all right to any penalties on account of the non-payment of such tithes.

The claim of the plaintiff was founded on the decree annexed to the Statute 37 Hen. 8, c. 12, intituled "An Act for Tithes in London," the decree bearing date the 24th February, 1545, and being made by the arbitrators chosen between the parsons, vicars, and curates of London, and the citizens and inhabitants of the same, as to payment of tithes, and being enrolled in Chancery, and being under the statute valid as an Act of Parliament. This decree, as the plaintiff alleged, entitled him to receive tithes after the rate of 2s. 9d. in the pound upon the annual value for the time being of all houses, shops, warehouses, cellars, and stables situate within the parish.

The premises of the defendants, the London Corn Exchange Company, consisted of two large areas under skylights, used respectively as corn and seed markets, a tavern or coffee-house and underground tap, a reading subscription room, and extensive cellarage on the basement. The revenue of the company was derived chiefly from the rents of stands or boxes placed round, and tables placed in the centre of the areas, and which were let to factors and others connected with the corn trade. The gross revenue of the company amounted to something * above 3300l.
 * 400 per annum, the gross amount of outgoings being about 900l. per annum.

There were two questions raised between the parties: the first, whether the plaintiff was not disentitled to maintain the suit, on the ground of an undetermined composition; and secondly and principally, the mode in which the company's premises were to be assessed for tithe.

In reference to the composition, it appeared that Dr. Owen, the plaintiff's predecessor as rector of the parish, had, before the erection of the company's buildings, agreed to accept from the company 90*l.* per annum, in lieu of or as a composition for tithe, this composition being treated by Dr. Owen as 2*s.* 9*d.* in the pound on the amount of his estimated rental of the houses pulled down to form the site of the Corn Exchange. This sum of 90*l.* was paid to Dr. Owen until his death, which took place in December, 1837, and was also received by the plaintiff without complaint or observation down to Michaelmas, 1847. Subsequently to that time, and before the filing of the bill, a long correspondence took place between the plaintiff and the defendants, the effect of which is alluded to by the Lord Chancellor in his judgment. The defendants, however, contended that, before filing his bill, the plaintiff was bound to have given a proper, legal, and formal six months' notice of his intention to determine the composition.

With regard to the second point in the suit, namely, the mode of assessment, the company contended that they ought to be treated as occupiers as well as owners of the premises, and if so, that the rent obtained for the houses pulled down would be the "such yearly rent as the same was last letten for," within the meaning of the item of the decree, contained in the fourth * section of the statute; and that the same result would * 401 follow by regarding the case as within the item contained in the eighth section, relating to the conversion of a dwelling-house into a "warehouse, storehouse, or such like." They had also been advised that the case resembled that of the dyehouse or brewhouse mentioned in the ninth section. (a)

* The suit came on to be heard before the Vice-Chan- * 402

(a) The following are the sections of the statute above referred to:—

II. As touching the payment of tithes in the city of London, and the liberties of the same, it is fully ordered and decreed by, &c., that the citizens and inhabitants of the said city of London and liberties of the same, for the time being, shall yearly, without fraud or covin, for ever pay their tithes to the parsons, vicars, and curates of the said city and their successors for the time being, after the rate hereafter following; that is to wit, of every ten shillings rent by the year of all and every house and houses, shops, warehouses, cellars, stables, and every of them within the said city and liberty of the same, sixteenpence-halfpenny. And every of twenty shillings rent by the year of all and every such house and houses, shops, warehouses, cellars, and stables, and every of them, within the said city and liberties, two shillings and ninepence. And so above

cellor KNIGHT BRUCE, sitting for the late Vice-Chancellor Sir JAMES WIGRAM, on the 2d July, 1851, when his Honor thought that notice of the determination of the composition ought to have been given, but offered the plaintiff an opportunity to try his right at law. On the plaintiff declining this proposal, the Vice-Chancellor made the order now appealed from, dismissing the bill.

The appeal which was partially opened on the 18th February, 1852, before the then Lord Chancellor Lord TRURO, now came on to be heard before Lord ST. LEONARDS.

Mr. Bethell, Mr. Hugh Hill, and Mr. Speed, for the plaintiff. — They referred to the evidence in the case in regard to the payments of 90*l.*, and contended that those payments were neither made to Dr. Owen and the plaintiff, nor received by them, as a composition, and that even if so paid and received, the composition had been determined by the plaintiff; that there was no necessity for a trial at law to establish the plaintiff's right, and that he was clearly entitled to institute the present suit. On the question of how the premises should be rated, they submitted that the claim of the plaintiff was correct under the terms of the statute. They referred to and commented on *Walter v. Flint*, (a) *Worrall v. Nicholls*, (b) *Fell v. Wilson*, (c) *Kynaston v. Willoughby*, (d) *Antrobus v. The East India Company*, (e) *The Warden, &c. of St. Paul's v. The Dean*. (g)

the rent of twenty shillings by the year, ascending from ten shillings to ten shillings according to the rate aforesaid.

IV. Item, That every owner or owners, inheritor or inheritors of any dwelling-house or houses, shops, warehouses, cellars, or stables, or any of them, within the said city and liberties, inhabiting or occupying the same, himself or themselves, shall pay after such rate or tithes as is above said, after the quantity of such yearly rent as the same was last letten for, without fraud or covin.

VIII. Item, If any dwelling-house, within eight years last past, was or hereafter shall be converted into a warehouse, storehouse, or such like, or if a warehouse, storehouse, or such like, within the said eight years, was or hereafter shall be converted into a dwelling-house; that then the occupiers thereof shall pay tithes for the same, after the rate above declared of mansion-house rents.

IX. Item, That where any person shall demise any dyehouse or brewhouse, with implements convenient and necessary for dyeing or brewing, reserving a rent upon the same, as well in respect of such implements, as in respect of such dyehouse or brewhouse; that then the tenant shall pay his tithes after such rate as is above said, the third penny abated.

- (a) 3 Gwillim, 985. (b) 4 Gwillim, 1302. (c) 12 East, 83.
(d) Western's Tithe Cases, 147. (e) 13 Ves. 9. (g) 4 Price, 65.

THE LORD CHANCELLOR here suggested that it would be * well that the counsel for the defendants should appear for * 403 and argue the case on behalf of the holders of the stalls or tables as well as for the company, in order to avoid any necessity for directing the cause to stand over for want of parties, as none of the holders were made defendants in the suit. The parties acquiesced in this suggestion.

Sir W. P. Wood, Mr. Willes, and Mr. Humphrey, appeared for the defendants, and also for the holders of the stalls or tables, in support of the decision of the Vice-Chancellor. — They relied on the fact of the annual payments, contending that such payments were a composition, and that the composition had never been legally determined. As to the rating, they insisted that the holders of stalls or tables could not be treated as tenants. *Gray v. Cook*, (a) *Surman v. Darley*. (b) They also cited in the course of their argument *Hill v. Smith*, (c) *Aynsley v. Wordsworth*, (d) *Goode v. Howells*, (e) *Wood v. Leadbitter*. (g)

Mr. Bethell, in reply.

THE LORD CHANCELLOR, at the conclusion of the argument, said, that without intending then to dispose of the case, or to give an opinion on the question of the composition, he desired to suggest for the consideration of the parties, whether if the plaintiff should be held entitled to a decree of some kind or other, it would not be well to arrange to have a reference to the Master in such a form as would settle the yearly value of the premises, * minus * 404 that of any portions which were not liable to tithe.

THE LORD CHANCELLOR. — The course which was taken at the bar in regard to this case has relieved the Court from considerable difficulty; and the only question that I understand it is necessary for me to decide is, whether or not the plaintiff can maintain the suit, and that depends upon whether there was such a composition as bound him and required him to give a regular notice to put an end to it.

(a) 8 East, 336.

(b) 14 M. & W. 181.

(c) 4 Taunt. 520; 10 East, 476..

(d) 2 V. & B. 331.

(e) 4 M. & W. 198.

(g) 13 M. & W. 838.

There is a distinction between this case and the ordinary case of a composition for tithe; for where a money payment is made upon annual value, it requires very strong evidence to maintain that it is a composition; and that it is so cannot be inferred from the mere circumstance of the receipt of an annual sum below the annual value. A party may choose to take less than the actual value, or he may not be able to ascertain what that value is; and it is not, therefore, like a money payment made in respect of prædial tithes, where there can be no dispute or doubt that one thing is being paid in lieu of or in commutation for another. A case then like the present must stand on its own peculiar circumstances.

I will first assume that the payment in question began as a composition with Dr. Owen, although that might be considered a question of considerable difficulty; but supposing that to be so, the next point is, whether that composition was adopted and accepted by Mr. Letts, the plaintiff. Mr. Letts undoubtedly received and accepted the same payment as had previously been made to

Dr. Owen, and I am now assuming that that payment was a * 405 composition, but there was no direct dealing between * him and the owners of the property, in regard to the acceptance of less than the value. It might well be, that finding a payment which had been made with reference to the old value, that is, the value of the houses originally standing on the ground, which houses had been thrown down in order to erect the new Exchange, he would accept that payment, not knowing the value, or not wishing for the time to disturb the arrangement; but that would not amount to a composition. What might be a composition in respect of one man, might be received by another without knowledge that it was a composition, and being an annual payment in money, and not being of the value of the actual two shillings and ninepence in the pound, it would not of itself amount to a composition. I think it very doubtful, upon the whole of this case, whether there was such an adoption of the previous dealing between Dr. Owen and the company, as would amount to a composition binding on Mr. Letts.

I will, however, assume that there was a good composition with Dr. Owen, and that it was accepted by and bound Mr. Letts; and the question then is, whether that composition has been put an end to. I am not aware of any authority which would decide in regard

to a payment like this, that you must give the same notice as would be requisite in regard to one for a common render of tithes: I believe it is not touched by decision, and I give no opinion upon the point. I am, however, very clear, upon the correspondence, that the effect of it is an assertion by Mr. Letts that he is receiving less than the value, and an acquiescence on the part of the Corn Exchange, not in any supposed exaggerated value which they believed at that time Mr. Letts was putting on the property, but an acquiescence in the alteration and revision of the annual payment which was at that * time in course of payment to * 406 him. They hint indeed at what he has accepted, but they do not allege that he is bound to accept the annual sum tendered to him, because he had formally adopted and accepted that which amounted to a composition on the part of his predecessor, Dr. Owen. It is impossible to read the correspondence without coming to the conclusion that it would be taking the plaintiff perfectly by surprise if I was to allow the objection set up by the defendants. The parties came here upon questions with reference to the operation of the decree under the Act, and not on the point that Mr. Letts had not a right to say that, for the time to come, he would have that to which he was justly entitled.

My opinion therefore is, there being no point of law, but the matter being one of fact and upon the dealings between the parties, that the plaintiff has a right to maintain this suit; and it having been arranged at the bar that the company shall be considered as appearing also for the tenants, and the question being only one of value to be ascertained either by tenancy or otherwise as may turn out to be just, I think there will be nothing but the common account to be directed. With regard to the period from which that account should be taken, I am not disposed to carry it further back than the filing of the bill.

Considerable discussion then took place as to the form in which the decree should be drawn up, in the course of which the Lord Chancellor expressed his desire not to exclude the company from raising a question as to any portion of the premises which might not in law be deemed liable to tithe.

* It was ultimately arranged, with the sanction of his * 407 Lordship, that, after providing in the usual way for the reversal of the order of the Vice-Chancellor and inserting the

submission of the company to be bound in respect of their tenant's liability, the decree should declare the plaintiff to be entitled to tithes after the rate of two shillings and ninepence in the pound on the annual value of the London Corn Exchange and premises, to be ascertained in manner thereafter directed, from the filing of the bill; that it should be referred to the Master to inquire into and ascertain the annual value of the London Corn Exchange and premises in each year from and since the date of the filing of the bill, and that in making such inquiry the Master should have regard with respect to such parts of the premises as were let at annual rents, to the annual rents received by the company in respect thereof, but deducting therefrom such parts of such rents, if any, as were paid for or properly attributable to any matters or things included in or incident to such lettings the annual value of which was not under the statute chargeable with tithes; with liberty to state special circumstances.

1852. March 13. Before the Lord Chancellor Lord ST. LEONARDS.

A. B. entered into a bond as a surety: the creditor subsequently took from the principal debtor a promissory note for the amount payable in two months, but afterwards, in consequence of the insolvency of the debtor, sued A. B. on the bond. A. B. then filed his bill to restrain the action, on the ground that he was discharged from liability by the giving of the promissory note: the creditor, by his answer, denied that such was the effect of the transaction; and on the hearing, an inquiry was directed in respect of the circumstances under which the promissory note had been given. The Master reported that, though there was not any written or any distinct parol agreement between the parties, yet there was a general understanding that the giving of the note was not to affect the bond. *Held*, on further directions, that, under these circumstances, there was no case for the interference of a Court of Equity.¹

¹ The question seems to be one of intention. And although the taking a bill or note payable at a future day is at least *prima facie* evidence of a suspension of the debt on account of which it is taken, and consequently a discharge of sureties and guarantors from their liability for the same debt, still it appears that the presumption arising on the face of the transaction may be rebutted by proof that the instrument was taken merely as additional or collateral security, and that it was not understood that the debt was to be suspended.

A transaction, which would otherwise operate as a release of a surety, will not have that effect if the remedy against the surety is reserved;¹ and the question therefore in the above case was, there being no special ground for equitable relief, whether an agreement to reserve the rights against the surety really existed. *Held*, on the evidence and the Master's report founded on it, that such an agreement did exist, and also that parol evidence was admissible to prove it.²

THIS was an appeal by the plaintiff, Jacob Wyke, against an order made by the Vice-Chancellor KNIGHT BRUCE on further directions, bearing date the 27th March, 1851, dissolving an injunction previously granted, and staying all further proceedings in the suit.

The bill was filed in January, 1849, against Alice Rogers and Seth Evans, but on the death of the latter was amended by striking out his name as defendant. It stated, in effect, that the plaintiff, on the application of S. Evans and on an arrangement made between them in consequence of such application, joined S. Evans in a bond, dated the 18th May, 1848, to the defendant A. Rogers, in the penal sum of 800*l.*, A. Rogers having advanced to the plaintiff 120*l.*, and to S. Evans 280*l.*, and the condition of the bond being that the same should be void on payment by S. Evans and the plaintiff, or either of them, of 400*l.* to A. Rogers; that the arrangement between the plaintiff and S. Evans was, that so far as regarded the 280*l.* the plaintiff executed the bond only as surety for S. Evans; that A. Rogers was at the * time of * 409 taking the bond well aware of this arrangement; that the

The suspension of the debt and consequent discharge of the surety depend on the understanding of the parties at the time the new security is given. See *Armistead v. Ward*, 2 P. & H. 504; *Weakly v. Bell*, 9 Watts, 273; *Ripley v. Greenleaf*, 2 Vt. 129; *Price v. Price*, 16 M. & W. 232; *Baker v. Walker*, 14 M. & W. 465; *Okie v. Spencer*, 2 Whart. 253; *Mercer v. Lancaster*, 5 Barr, 160; *Myers v. Wells*, 5 Hill, 463; *Wade v. Stanton*, 5 Howard, 631; *Putnam v. Lewis*, 8 John. 389; *Frisbie v. Larned*, 21 Wend. 450, 452; *Fellows v. Prentiss*, 3 Denio, 512; *Bangs v. Mosher*, 23 Barb. 478; *Hutchinson v. Moody*, 18 Maine, 393; *Norton v. Roberts*, 4 Monroe, 494; *Chitty Contr.* (10th Am. ed.) 847, 848; *Belshaw v. Bush*, 11 C. B. 191; *Crowe v. Clay*, 9 Exch. 604. As to the effect of giving a bill or note in regard to payment of a pre-existing debt, see *Chitty Contr.* (10th Am. ed.) 848 and cases cited in note (c).

¹ See *Owen v. Homan*, 3 M'N. & G. 378, 406, and cases in note (1); S. C., 4 H. L. Cas. 997, 1038; *Webb v. Hewitt*, 3 K. & J. 438; 3 Lead. Cas. in Eq. (3d Am. ed.) 537 [825], notes to *Rees v. Berrington*; *Ex parte Harvey*, *In re Blakely*, 4 De G., M. & G. 881.

² See 3 Lead. Cas. in Eq. (3d Am. ed.) 537, 538 [825].

plaintiff duly paid the 120*l.* advanced to him when the same became due, but that S. Evans did not pay the 280*l.*; that when the 280*l.* became due, S. Evans gave to A. Rogers a promissory note for the amount, payable two months after date, and that A. Rogers thereupon agreed that the payment of the 280*l.* due on the bond should be postponed until the promissory note should arrive at maturity; that this arrangement between S. Evans and A. Rogers was made without the consent or knowledge of the plaintiff; that, the promissory note not being paid, an action was brought against S. Evans for the amount, and judgment recovered in the action; that no execution was issued on the judgment, S. Evans being insolvent; that A. Rogers then commenced an action against the plaintiff and S. Evans upon the bond for the 280*l.* and interest then due; and that S. Evans was lately dead insolvent. The bill charged that under the circumstances before mentioned the plaintiff was released from the bond, and that the bond was satisfied so far as regarded the plaintiff's liability under the same: it prayed a declaration to this effect, and that the defendant might be restrained from proceeding with the action.

The answer of the defendant, which was filed in March, 1849, denied generally that the plaintiff was discharged from his liability under the bond: it insisted that the plaintiff joined in the bond as a surety for the whole sum of 400*l.*; and as to the promissory note, it stated that at the time the same was given, it was distinctly understood and agreed that it was not to be considered as payment of the balance due on the bond and as substituted for the bond, but that the bond was to continue as a security for the remainder of the sum of 400*l.* after deducting the 120*l.*

* 410 paid by the plaintiff: it denied any *undertaking or agreement on the part of the defendant for postponing the payment of the 280*l.* due on the bond.

Previously to the coming in of the defendant's answer the common injunction was, on the 28th March, 1849, obtained by the plaintiff; and this injunction was, on the 26th April, continued on the terms that the plaintiff should give judgment at law for the amount claimed in the action, to be dealt with as the Court might direct, without prejudice to any question in the cause.

The suit was heard before the Vice-Chancellor KNIGHT BRUCE, on the 27th February, 1850, when his Honor made an order referring it to the Master to inquire and state whether at the time when

the promissory note was given, there was any and what agreement respecting the bond between A. Rogers and S. Evans, and under what circumstances the promissory note was given, with liberty to state circumstances specially, and either party was to be at liberty to examine Philip Price, the solicitor of A. Rogers, notwithstanding his having been previously examined in the cause.

The Master made his report under this reference on the 15th July, 1850, proceeding on a state of facts laid before him on the part of the defendant supported by the deposition of P. Price, and P. Price having also been examined before him *visd voce* in reference to the inquiries directed. The Master found that, in May, 1843, S. Evans applied to P. Price, then the solicitor of A. Rogers, to procure for him the loan of 400*l.* on the security of the joint and several bond of himself and the plaintiff, and P. Price thereupon applied to A. Rogers to advance 400*l.* to S. Evans, which she agreed to do on having the same with interest at 5*l.* per cent * secured to her by the joint and several bond of S. * 411 Evans and the plaintiff; that on the 18th May, 1843, a bond was executed by the plaintiff and S. Evans, in the penal sum of 800*l.*, conditioned for the payment of 400*l.*, which sum was paid by P. Price, as the agent of A. Rogers, to S. Evans with the consent of the plaintiff. The Master then set out the bond to the effect above stated; and found further that, on the 20th January, 1844, the plaintiff paid A. Rogers 120*l.* on account of the principal secured by the said joint and several bond, together with 1*l.* 5*s.* for interest; and that on that occasion a conversation passed between P. Price and the plaintiff, in the presence of A. Rogers, as to the liability of the plaintiff for the residue of the 400*l.*, and that P. Price thereupon stated to the plaintiff that his liability extended to the whole of such remainder if the same was not paid by S. Evans, and P. Price then and thereupon, in the presence of the plaintiff, wrote a memorandum at the back of the bond, which was thereupon signed by A. Rogers in the presence of P. Price and of the plaintiff, and was as follows: "Memorandum, January 20, 1844. That the within named Jacob Wyke paid me this day 120*l.*, in part and on account of the principal of the within mentioned bond, together with 1*l.* 5*s.* balance of the interest for the same up to this date. As witness my hand the day and year aforesaid."

The Master further found that previously to the 20th January, 1845, A. Rogers applied to S. Evans for payment of the residue of

the 400*l.*; and in consequence of such application, S. Evans, on the 20th January, 1845, made and delivered to A. Rogers the following promissory note: "Abergavenny, January 20, 1845. 280*l.* two months after date. I promise to pay Mrs. Alice Rogers or her order the sum of 280*l.* value received. Seth Evans.

At Messrs Baily & Co., Bankers, Abergavenny."

* 412 *The Master stated that upon consideration of the evidence of P. Price, he was of opinion that the promissory note was not given in discharge of the bond, and that there was a general understanding between A. Rogers and S. Evans, that A. Rogers' remedy on the bond was not to be taken away; but he found that there was no written, nor, beyond the general understanding before mentioned, any distinct parol agreement respecting the bond between A. Rogers and S. Evans.

Mr. Price in his deposition in the cause stated that, at the time when the promissory note was given, "it was most distinctly understood and agreed to by the said S. Evans that the said promissory note was not to be considered as payment of the balance due upon the said bond, and as substituted for the said bond, but that the said bond was to remain as a security for the balance then due thereon. . . . It was distinctly understood and agreed to by the said S. Evans that the said bond should remain as the security for the balance due on it, and that the said defendant, A. Rogers, should be entitled to put the said bond in force, notwithstanding such promissory note had been given." Mr. Price completely adhered to this statement in his *vivâ voce* examination before the Master.

The cause came on to be heard upon further directions upon the Master's report before the Vice-Chancellor KNIGHT BRUCE on the 27th March, 1851, when an order was made that the injunction granted should be dissolved; that the defendant should be at liberty to issue execution on the judgment obtained in the action; that the plaintiff should pay the costs of the suit; and that all further proceedings therein should be stayed.

* 413 This order was taken in the absence of the plaintiff, * on an affidavit of the defendant having been served with the order on setting the cause down for hearing. The Vice-Chancellor, however, required the case to be opened and the facts stated to him, and he considered and expressed an opinion on the question raised. The plaintiff afterwards applied to have the cause restored

to the paper and heard; but the defendant objecting to this, the Vice-Chancellor refused to interfere. The plaintiff, under these circumstances, now appealed to the Lord Chancellor.

[On opening the case, some discussion took place as to whether it could be properly treated as an appeal, and whether an application for a rehearing ought not to be made to the Vice-Chancellor.

THE LORD CHANCELLOR was clearly of opinion that such was the right course for the plaintiff to pursue; but said that if the defendant did not object, he would, with the view of saving delay and expense to the parties, allow the present hearing to proceed; adding, however, that it must not be drawn into a precedent.]

Mr. C. P. Cooper, Mr. Bilton, and Mr. Joseph Brown, for the appeal. — They contended that the taking of the promissory note had discharged the surety, either as changing the security altogether, or as giving time to the principal debtor; that so far as the finding of the Master negatived this conclusion, it was wrong; that the only evidence in support of the defendant's case was that of her own solicitor, and that this ought not to be taken as against the plaintiff; that any reservation of the creditor's right against a surety on a giving of time to the principal debtor must be clear and express, and must *also appear on the face of the *414 document giving the time. They cited *Stone v. Comp-ton*, (a) *Lewis v. Jones*, (b) *Ex parte Glendinning*, (c) *Byles on Bills*, p. 186, ed. 5.

Mr. Wigram, Mr. Bovill, and Mr. Pearson, for the defendant. — They submitted that the sole question was what was the intent with which the promissory note was given, and that to make it a discharge of the surety it was necessary to prove that such was its intent, by showing either that it was to supersede the bond or to suspend the remedy on the bond; and that the report of the Master negatived entirely the plaintiff's case. They referred to *Pring v. Clarkson*. (d)

Mr. Brown, in reply.

THE LORD CHANCELLOR. — In this case the plaintiff entered into

(a) 5 Bing. N. C. 142, see p. 156.

(b) 4 B. & C. 506.

(c) Buck, 517.

(d) 1 B. & C. 14.

a bond as surety for 400*l.*, of which 120*l.* have been paid, and 280*l.* remain due. A promissory note was given by the principal debtor to the creditor for the latter sum, payable at two months. The effect of this transaction at law was in no manner to impeach the bond; but the question might arise whether the promissory note did not of necessity, in the absence of any agreement being proved to the contrary, operate as a discharge of the surety; that is to say, whether it was simply a collateral security, or whether it was not a security which gave time to the principal debtor.

* 415 All the cases prove that, where an instrument is * taken which might otherwise operate as a discharge of the surety, there will be no discharge if the remedies against the surety are preserved. In the present case an action was brought on the bond, to which the defendant, the plaintiff here, had no defence; he therefore comes to equity for relief. This Court, however, cannot interfere against a legal obligation, unless an equitable case is made out; and it must therefore be shown that the transaction in question released the plaintiff from the obligation. No such case has been attempted to be made out, and I give no opinion upon it; because it is perfectly clear in law that an agreement, that a transaction which would of itself operate to release the surety shall not have that effect, may be proved by parol evidence.

It was said at one time in the course of the argument that parol evidence could not be admitted to impeach the promissory note. This, however, was not the purpose for which the evidence was sought to be introduced; it was only to prevent the collateral operation of that note by showing that it was not intended to prevent proceeding on the bond, and thus to release the surety. If the evidence had not been admissible, the plaintiff ought not to have allowed the case to go to the Master; but such was the course taken, and a great deal of evidence has in consequence been gone into, the result of which is clearly against the plaintiff. The defendant having sworn in her answer that there was an agreement that the promissory note should not affect her security, the plaintiff said that that answer was not to be relied on, and the Court therefore directed the inquiry. The result has been to prove in the most distinct manner that it was understood between the parties that the defendant's remedy on the bond was not to be affected; so that even if I was to reverse the decree, nothing more could be done than has been done already.

* Cases were cited to show that the reservation of the rights * 416 against the surety ought to have appeared on the face of the promissory note ; they, however, prove no such thing.¹ They were cases of regular deeds or written instruments ; and the Court held that their effect could not be taken away by a mere parol agreement. In the present case the finding of the Master is plain ; it is in effect that there was a general dealing and a general understanding which, in point of law, amounts to a stipulation that prevented the promissory note in equity from having the effect of discharging the surety. What then a Judge of this Court has to decide is, whether or not there was in truth such an agreement as the defendant contends for : the evidence shows that there was ; and the Master's report appears to me to be right. I must, therefore, dismiss the appeal, and with costs.

* LEAF v. COLES.

* 417

AND

In the Matter of JAMES COLES, a Person of unsound Mind.

1852. March 18. May 5. Before the Lord Chancellor Lord ST. LEONARDS.

In a case where the dissolution of a partnership had been decreed in consequence of the lunacy of one of the partners, and large sums had been paid into Court to the separate account of the lunatic in respect of his share of the capital and profits of the business, the Lord Chancellor, on being subsequently satisfied of the complete recovery of the lunatic, ordered the fund to be paid out to him.

Mode of proceeding in such cases.

On the 10th December, 1851, a decree was made in this cause and matter by the then Lord Chancellor, Lord TRURO, in pursuance of the decision of his Lordship reported *ante*, page 171, for the dissolution from that date of the partnership then existing between the plaintiffs and the defendant, James Coles, on the ground of the insanity of the defendant, upon the terms of the plaintiffs paying into Court to the credit of the cause and matter to an account to be entitled "The separate account of James Coles, a person of

¹ See *Owen v. Homan*, 3 M'N. & G. 378, 411 ; S. C., 4 H. L. Cas. 997 ; *Ex parte Harvey*, *In re Blakely*, 4 De G., M. & G. 881.

unsound mind: A capital account," the sum of 66,474*l.* 5*s.* 1*d.*, as the amount of the capital of the defendant in the business on the 31st December, 1850, including his share of the profits therein up to the same day, and also of paying into Court to an account to be entitled "The separate account of James Coles, a person of unsound mind: Income account," the sum of 6726*l.* 8*s.* 5*d.* in respect of his share of the profits of the business from the 31st December, 1850, to the dissolution, and interest on the said sum of 66,474*l.* 5*s.* 1*d.*, at 5*l.* per cent from the 31st December, 1850, to the 12th January, 1852, after deducting the amount of certain sums drawn out on account of the defendant and interest thereon.

These payments were duly made by the plaintiffs accordingly. Soon afterwards the defendant, James Coles, became restored to health and soundness of mind, and on the 10th February, *418 1852, was, under the 72d section * of the Act 8 & 9 Vict. c. 100, discharged from the care of Dr. Stilwell, with whom he had been placed.

The defendant then presented a petition to the Lord Chancellor, stating the proceedings in the suit and the above facts, and also stating that he had gradually completely recovered his health, and was then of sound mind, and sufficient for the government of himself and of his estate, and was willing to submit himself to the examination of such medical men as his Lordship should direct; and that he entirely approved of the arrangement made with respect to the copartnership and his interests therein. The petition prayed that the sum of 66,474*l.* 5*s.* 1*d.*, and the sum of 6726*l.* 8*s.* 5*d.* might be respectively paid to the petitioner, and that George Coles, the brother of the petitioner, and who had been appointed the guardian of his person and the receiver of his estate, might be discharged from those offices. This petition, which was supported by the affidavits of Dr. Conolly and Dr. Stilwell, now came on to be heard before the Lord Chancellor.

Mr. Bethell and *Mr. C. Barber*, for the petitioner.

Mr. Bacon and *Mr. Stevens* appeared to consent on behalf of the guardian and receiver, the heir-at-law, and all the next of kin.

THE LORD CHANCELLOR.—I should be sorry, by any delay in making the order which is asked, to throw the slightest imputation

of a doubt on my belief of Mr. Coles's recovery ; but this recovery is very recent, and the Act of Parliament has manifestly pointed out that there shall in these cases be a discretion in the holder of the Great Seal, during a particular portion of time. (a)

* What I propose to do, having some experience in mat- * 419
ters of this kind, is, to make an order for the payment to Mr. Coles of such money as he may have immediate occasion for ; if, for instance, he requires the 672*l.* 8*s.* 5*d.* of interest, he may on these affidavits receive it. If this was a case of real estate, I feel that I could have no hesitation in making the order at once ; but the sum in Court is a very large one to be put into the possession of any man, and looking therefore to the comfort and safety of Mr. Coles, looking also at the providence which is over us all and which has so visited him, I think it will be more prudent to delay the order for the payment of the whole of the fund. I repeat, that, in prudence, I think it better to make now an order for the payment only of such sum as may be required for immediate wants ; and I propose on this day month to request one of the Masters to see Mr. Coles, and after that, when I have had the pleasure of conversing with Mr. Coles for a quarter of an hour in my private room, I will make the order for the payment of the whole of the funds in Court.

Mr. Bethell, on being asked by his Lordship what sum would be now required, stated that nothing would be wanted at present, the main object of the petition being to obtain the investment of the 66,474*l.* 5*s.* 1*d.* which was in Court and unproductive.

THE LORD CHANCELLOR, stating that he wished it to be understood that he did not entertain the least doubt of Mr. Coles's recovery, then made an order that the sum of 66,474*l.* 5*s.* 1*d.* should be invested in consols ; and that Mr. Coles should attend one of the Masters in Lunacy on the 13th April next, in order that the Master might personally examine him as to his state of mind.

* *Mr. Coles* having attended the Master in pursuance of * 420
the foregoing order, and the Master having made his report dated the 16th April, 1852, the petition was again put in the paper of the Lord Chancellor.

(a) See 8 & 9 Vict. c. 100, § 95.

May 5.

THE LORD CHANCELLOR, on coming into Court, said that he had just had an interview with Mr. Coles in his private room, and that the result was, that he had much pleasure in making the order asked by the petition.

The order stated, that, upon hearing the petition and the report of the Master, and Mr. Coles having attended and been personally examined by the Lord Chancellor, and appearing to be in a sound state of mind, his Lordship ordered that the proceedings in the matter should be superseded and determined, and that George Coles should be discharged from the several offices of guardian and receiver, and from the care of the person and receipt of the estate of James Coles, and that James Coles should be restored to the government of himself and his estate: and his Lordship further ordered that the stock purchased with the said sum of 66,474*l.* 5*s.* 1*d.* in pursuance of the order of the 13th March, 1852. should be transferred into the name of James Coles, and that the said sum of 6726*l.* 8*s.* 5*d.* cash should be paid to James Coles.

* 421 * In the Matter of THE VALE OF NEATH AND SOUTH WALES BREWERY JOINT-STOCK COMPANY, and of THE JOINT-STOCK COMPANIES WINDING-UP ACT, 1848 (11 & 12 Vict. c. 45).

LAWES'S CASE.

1852. March 10, 17. Before the Lord Chancellor Lord ST. LEONARDS.

By the deed of settlement of a company its directors had the power of purchasing on behalf of the company shares in the capital of the company when there should be a surplus fund of 10,000*l.*, and there was no prohibitory clause in the deed restricting the purchase under other circumstances. The deed provided the mode by which a shareholder parting with his shares was to be relieved from subsequent responsibility. The deed also contained clauses regulating the mode of convening extraordinary and general meetings,¹ and provided that, where an extraordinary meeting was to be convened, notice

¹ See 1 Lindley Partn. (Eng. ed. 1860) 469, 470.

should be given of the specific object of the meeting to each shareholder. The company being in insolvent circumstances, an extraordinary meeting was held and a resolution passed, the purport of which had not been previously notified, authorizing the directors to purchase, within three months, the shares of any member who was desirous of retiring from the company, who would lend to the company a sum equal to the purchase-money. After the expiration of the three months, a general meeting of the company was held, at which the directors were authorized to allow such further time as they might think reasonable to those shareholders who had not complied with the resolution of the extraordinary meeting, and the forfeiture of the shares of those proprietors who should continue to be defaulters was sanctioned. Acting on the resolution of the general meeting, W. L. sold his shares to one of the directors on behalf of the company, and lent a sum equivalent to the purchase-money, receiving the loan note of the company. Having died before the transfer of the shares was effected with all the formalities prescribed by the deed, the company, at the instance of his executor, completed the transfer by the execution of those formalities. *Held*, first, that the resolution of the extraordinary general meeting, being invalid, was incapable of being ratified by the general meeting, whose powers were limited to acts not contrary to the deed; and, secondly, that the resolution of the general meeting, in terms applying only to defaulters, could not be construed to extend to the privilege of retiring from the partnership, which had expired by lapse of time; and, thirdly, that the Master, acting under an order for winding up the company, had rightly included the executor in the list of contributories without qualification.¹

THIS was a motion on the part of John Lawes, the executor of W. Lawes, by way of appeal from an order of the Vice-Chancellor KNIGHT BRUCE made on the 16th January, 1851, whereby he refused to discharge or * vary the certificate of the Mas- * 422 ter, placing J. Lawes upon the list of contributories of the above company in respect of thirty shares without qualification. The question of his liability depended upon the validity of a transfer of the shares to a third party as trustee for the company, regard being had to the provisions of its deed of settlement. The company was formed under a deed in 1840, and W. Lawes, the appellant's testator, was a shareholder in respect of thirty original shares.

On the 10th April, 1844, an extraordinary general meeting of the company was convened, whereat the following, among other

¹ See *Ex parte Morgan*, 1 M.N. & G. 225, 235, 240, and cases cited in note on each of those pages; 1 Lindley Partn. (Eng. ed. 1860) p. 105, and cases in note (e), p. 494, 508, 509, 613, 614; 2 *ib.* 1130, 1131, 1144; *Spackman v. Evans*, L. R. 3 H. L. 171; *Straffons' Executors' Case*, 4 De G. & Sm. 256; *Daniell's Case*, 22 Beav. 43.

resolutions, was unanimously passed: "That if any shareholder should be desirous of withdrawing from the company, the directors shall be at liberty to purchase his shares, at a price not exceeding 15*l.* per share, on his investing, or procuring to be invested, an amount not less than the purchase-money for his shares, and taking the loan note of the company for five years at 5*l.* per cent interest for such investment, together with the purchase-money for his shares; but in case of preference shares being so purchased by the company, the same shall be taken at a price not exceeding 20*l.* per share, and not less than a corresponding amount be introduced." It was also resolved that all advances to be made in pursuance of the resolutions should be made within three months from the date on which the meeting was held. The circular convening this meeting stated generally its object to be to receive from the directors a proposition for paying off the advances made during the recent interruption to the trade, and discharging such other liabilities as required to be paid at an early period, and to provide for such payments without appropriating to that purpose the funds accruing from the present trade.

* 423 * W. Lawes was not present at that meeting, but a copy of the resolution was sent to each member of the company by the post, in conformity with the provisions of the company's deed. He did not, however, avail himself of the privilege of selling his shares, or of advancing any money to the company within the period of three months, fixed by the resolution.

On the 31st July, 1844, the ordinary annual general meeting of the company took place, when the following, among other resolutions, was adopted; viz., "That the directors allow such further time as they think reasonable to those shareholders who have not complied with the resolutions passed at the special general meeting held in Bristol, on the 10th of April last; and that after the expiration of such further time, this meeting sanctions the forfeiture of the shares of those proprietors who shall continue to be defaulters."

On the 21st August, 1844, W. Lawes, being desirous of acting on this resolution, sold his shares to W. H. Buckland, on behalf of the company, by a deed duly executed. The consideration on the transfer deed was the full price of the shares in the market; and a loan note, signed by two of the directors, of whom W. H. Buckland was one, was given for 900*l.*, payable in five years, with interest at 5*l.* per cent.

Soon after the sale and transfer of his shares, W. Lawes died, and his son and sole executor, J. Lawes, the present appellant, called upon the directors to complete the transaction by entering the same in the share register-book, and by issuing a certificate of the transfer; and the entry was accordingly made, and the certificate issued in November, 1844.

Probate and legacy duty were paid by J. Lawes in * respect * 424 of the loan note, and interest was paid upon it up to the 21st August, 1846, by the company; but the affairs of the company subsequently became so embarrassed as to render it impossible for them to continue their engagements, and ultimately, in the year 1849, an order was obtained for the winding up of the company, under "The Joint-stock Companies Winding-up Act, 1848." Under these circumstances, the Master placed J. Lawes on the list of contributories without qualification, which judgment being affirmed by the Vice-Chancellor, J. Lawes now appealed to the Lord Chancellor. (a)

(a) The following clauses of the company's deed of settlement were more particularly referred to.

22. The directors shall at all times have or keep in the hands of the bankers of the company such a balance as shall be sufficient to answer the current expenses and demands of the company; and when and so often as the balance in the hands of the bankers shall be more than sufficient for the ordinary purposes of the company, or for paying the yearly dividends to the proprietors, the directors shall, so far as they conveniently can, accumulate the same until a surplus fund be raised or provided, amounting to the sum of 10,000*l.* sterling money, and shall report the amount of such accumulation at every annual general meeting; and for making the aforesaid accumulations the directors shall lay out and invest the moneys or funds appropriated to such purposes in the names of the trustees for the time being of the company in any of the public stocks or funds of Great Britain, or at interest upon government or real securities in England or Wales, but not in Ireland; or in paying off and discharging the said mortgage money or sum of 15,000*l.* or any part thereof, and shall from time to time alter, vary, and transpose the said stocks, funds, or securities, as occasion may require or as it shall be deemed expedient; and in case a sufficient balance at the bankers' cannot be obtained by other means, or for the purposes to which such surplus fund is by these presents made applicable, the said trustees or trustee for the time being, on being thereunto required by the directors, shall sell and convert into money a competent part of the surplus fund, and of the stocks, funds, or securities, in which the same shall for the time being be invested.

23. The directors may from time to time, by and out of the surplus fund hereinbefore mentioned, purchase and buy up any share or shares in the capital

* 425 * *Mr. R. Palmer and Mr. Lewin*, for the appellant. —
We submit that *Morgan's Case*, (a) on the authority of

stock of the company which shall be offered for sale; and shall at their discretion either sell as they may think proper, or shall suffer the same to sink into the general stock or funds of the company, for the benefit of the existing shareholders, according to their several and respective shares therein.

35. The respective persons in whose names the shares in the capital of the company shall from time to time be held and stand in the share register of the company, shall, for all the purposes of these presents, and by and between all the present and future shareholders of and in the said capital, be declared the true and absolute owners and proprietors of such shares respectively.

41. Upon all transfers of shares to purchasers and others approved of by the directors, and in all cases of husbands, executors, administrators, or legatees, applying to become proprietors of shares belonging to or claimed by them in those characters, and being approved of by the directors, such alterations shall be made in the share register-book, and also in the copies, by way of certificate of former entries therein respecting the same shares as the circumstances may require. And the approbation of the directors in all the above cases, to be valid, shall be manifested by entries or memorandums to that effect in the share register-book under the signatures of two of the directors for the time being, and by like memorandums so signed, added to or indorsed upon the copies or certificates of the former entries respecting the shares in question in the share register-book, or instead of such last-mentioned memorandums by such copies or certificates being delivered to the parties entitled thereto, of the new or altered entries respecting the same shares in the register-book.

42. In case any husband of a female proprietor, or any executor, administrator, or legatee, who shall not obtain the approbation of the directors to be admitted a proprietor of the company, or in case any guardian committee or assignee upon bankruptcy or insolvency shall not be able within six calendar months from the time of his marriage, or of his becoming such executor, administrator, legatee, guardian, or assignee, to sell or dispose of the share or shares belonging to or claimed by him in such character or right as aforesaid, to some other person or persons, to be approved of by the directors as proper to become the proprietor or proprietors thereof, it shall be lawful for the directors in all such cases, and they are hereby required on the application of the person holding, or entitled to, or claiming such share or shares as aforesaid, to purchase the same from him or her, at the current or market price thereof, or for such other price as the directors shall deem fair or reasonable; and the share or shares so purchased shall, under the order of the directors, be transferred to one of the trustees for the time being, in trust for and for the benefit of himself and the other proprietors of the company.

44. Whenever any share or shares in the capital of the company shall become actually forfeited, or shall be duly and effectually vested in any new proprietor, and such entry or alteration in regard to such share or shares shall have been made in the share register-book as hereinbefore required, then and not before

(a) 1 De G. & S. 750; S. C., 1 Mac. & G. 225.

* which the Vice-Chancellor decided the present, is distinguishable, and, if not to be distinguished, then that it * 426
 * ought to be overruled. The distinctions to which we * 427
 refer are, first, that in *Ex parte Morgan (a)* the party acted on the resolution of the extraordinary general meeting alone, and before the annual general meeting, while, in the present case, the transaction did not take place until after the annual general meeting had confirmed the resolution of the extraordinary general

the responsibility of a previous owner as a proprietor in the company with respect to the same share or shares, shall from and after the completion of such entry and certificate granted as aforesaid, and the payment of all instalments on such shares previously called for, cease and determine as to the same share or shares; and such previous owner shall thenceforth be exonerated and released from all subsequent claims, demands, and obligations in regard to the same share or shares, and from all future observance and performance of the covenants, conditions, and stipulations, contained in or referred to by this indenture, or in or by any deed or deeds relating thereto; and the certificate to be given by the directors as hereinbefore required of such entry, erasure, or alteration, shall at all times be evidence of such acquittance and discharge as aforesaid, in respect of such share or shares; and the person in whom any share or shares shall or may become vested, and whose name shall be entered as the approved proprietor thereof in the share register-book as hereinbefore mentioned, shall immediately thereupon, but not before, have and be subject to all the same privileges, advantages, and future liabilities in respect of such share or shares as the person originally owning such share or shares.

By the 47th clause, after referring to special matters to be transacted at the ordinary general meeting, it was provided that such other business should be transacted relating to the company, and such rules and regulations made for the better government of and carrying into effect the objects of the company, as might not involve a breach of or be inconsistent with the existing rules or regulations of the company. By clause 50 power was given to three directors or six proprietors, holding not less than one hundred shares, to call an extraordinary meeting by requisition expressing the object of the meeting, and such meeting was to be convened by circular letters to be issued to the proprietors seven days before the time, and stating the specific object or objects of the meeting. By clause 57 any extraordinary meeting duly convened had power to increase the capital of the company by creating new shares or otherwise; also to make new laws for the government of the company, and to carry on its affairs, or to amend or alter any existing laws, or to dissolve the company. But by clause 58 no such matter was to be done unless seven days' previous notice had been given (as provided by clause 50); and unless the letter to be sent to each proprietor should have stated every proposed increase of capital, new regulation or provision, every proposed amendment, alteration, or repeal, of any law or the proposed dissolution of the company.

(a) 1 Mac. & G. 225.

meeting. In the present case also the transfer was made with all the solemnities required by the deed, and the prescribed formalities as to the entry of the name of the transferee in the books of the company, and as to the issuing of the requisite certificate, were observed, whereas in *Ex parte Morgan* (a) both these formalities were disregarded; in that case, therefore, the transaction was incomplete, and the shares could not be said to have been effectually transferred. We further submit, that, inasmuch as the

company's deed contains no clause directly prohibiting the
 * 428 * purchase of shares, the directors had an implied authority to exercise the powers, which the members of any ordinary partnership possess, of buying out a partner. *Taylor v. Hughes*. (b) There has been such an acquiescence on the part of the general body of the shareholders, if not in law, at least in fact, as must preclude them from charging the estate of W. Lawes: *Graham v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company*; (c) and they are clearly not entitled to set up the invalidity of the resolution of the extraordinary meeting, by reason of the want of a proper notice, which resulted from their own negligence. *Ex parte Bagge*. (d)

Mr. Russell and *Mr. Terrell*, for the official manager.—The present case cannot be distinguished from *Ex parte Morgan*. (a) The company was formed for the purpose of carrying on the brewery, and to permit its funds to be applied to any other use would be contrary to the purpose and essence of its constitution. The transaction which we impeach was a complete misappropriation of the company's capital, and in proportion as the capital was withdrawn by retiring members, so was the liability of the remaining members increased. The resolution which was passed at the extraordinary meeting could not have bound the whole body of shareholders without their unanimous consent; but assuming that it had the power, yet it could only be exercised by means of resolutions in conformity with propositions previously submitted to the notice of each proprietor, which these confessedly were not; nor were the resolutions susceptible of being confirmed at a
 * 429 general meeting, as they were clearly without * the scope

(a) 1 Mac. & G. 225.

(c) 2 Mac. & G. 146.

(b) 2 Jones & Lat. 24.

(d) 13 Beav. 162.

of its functions. *Richmond's Executors' Case*. (a) Where, as in the present case, the certificate has been improperly signed, the mere fact that all the formalities subscribed by the deed have been adhered to will not make the act valid so as to bind the transferee: *Bosanquet v. Shortridge*; (b) and it can make no difference that the transferee is a mere trustee for the company.

Mr. Lewin, in reply.

March 17.

THE LORD CHANCELLOR. — The question in this case, whether J. Lawes was or not properly put upon the list of persons bound to contribute to the expenses of this company, depends upon the validity of the transfer to W. Buckland, as trustee for the company. This company, though consisting of a great number of persons, was strictly a trading partnership, and as such I am far from saying that, in the absence of any express provisions in the deed by which the company was constituted, it might not be governed by the rules as laid down by Lord ELDON in *Const v. Harris*; (c) but this partnership being in the nature of a joint-stock company, and its deed of constitution containing, among others, special provisions with respect to general and extraordinary meetings, it is especially necessary to hold its members as strictly as may be to the very letter of their contracts with each other, for otherwise, when it is proposed to deal with the affairs of the company in pursuance of resolutions passed at such general or extraordinary meetings, many of the partners, who may be either unable or unwilling * to attend, may find themselves bound by pro- * 430 ceedings which have taken place at such meetings, though directly opposed to the terms on which they have entered into the partnership.

It appears by the evidence that this partnership, which was at first supposed to be of very great value, was, at the time when the transaction took place, wholly insolvent. The twenty-second and twenty-third articles of the deed particularly provide, that, if there is a surplus fund to the extent of 10,000*l.*, the directors may purchase shares in the capital stock of the company upon such terms and conditions as they may think proper; that is, if the company

(a) 3 De G. & S. 96. (b) 4 Exch. Rep. 699. (c) Turn. & R. 496.

becomes so rich as to buy up the shares of certain of its members who may wish to retire, thereby increasing of course the interest of the remaining partners, this may be done. At the time, however, when this company was greatly in want of funds and in order to relieve them from the pressure of such circumstances, an extraordinary meeting was convened. The deed expressly provides that in calling an extraordinary meeting there shall be stated in the circular letter convening the meeting, the specific object or objects for which the meeting is convened. It is perfectly clear that the circular letter calling the extraordinary meeting of the 10th April did not state its specific object, and it is impossible to read that notice without feeling satisfied that there was an intention not to state fully to the shareholders what the scheme was which the directors intended to propound. At that meeting a resolution was passed, authorizing the directors to buy the shares of any shareholder who wished to retire, at three-fourths of the nominal value of such shares, upon condition of the retiring shareholder lending a sum to the company equal to the amount of the purchase-money; and he was to receive one of the loan notes of the company, for both the purchase-money and the loan,

* 431 which * was to remain at interest for five years. That appears to me to have been a mode of increasing the difficulties of this partnership; for it was not only pledging the company to more debt than was in any way called for or necessary, but it was actually withdrawing a portion of the capital from the trade, and clearly throwing greater liabilities upon the partners who remained.

W. Lawes did not, within the time limited by that resolution, avail himself of the right, or rather the privilege on his part, to tender to the directors his shares (the right, so far as the resolution went, was on the part of the directors to buy those shares), but subsequently there was a general meeting of the company, at which a resolution was passed authorizing the directors to allow such further time as they might think reasonable to those shareholders who had not complied with the resolutions passed at the extraordinary general meeting, and sanctioning the forfeiture of the shares of those proprietors who should continue to be defaulters after the expiration of such further time.

The question was argued before me as to whether that general meeting had the power or not to pass such a resolution: in my

opinion they had not the power, for the powers of general meetings are expressly confined to measures not inconsistent with the existing rules and regulations of the company. The resolution in question, involving a positive breach of such rules, was clearly beyond the powers of a general meeting, and I think, therefore, its validity must depend on the powers of the extraordinary meeting. If the circular convening that meeting had stated the specific object for which it was to be held, I do not deny that the resolution may have been within the scope of its authority. I am clearly of opinion that it did not fall within the powers of the general * meeting : but assuming for a moment that it did, * 432 I think upon fully considering the terms of the resolution that it was confined to the liability of members to contribute their loans, and that it did not include the power or privilege of selling shares and retiring from the partnership, for the resolution speaks of defaulters, and of the forfeiture of their shares, alluding solely to liabilities ; but it says not one word about the privilege of selling shares to the company, and of withdrawing at a certain sacrifice from all liabilities to the company, which was at the very time confessedly in a state of insolvency.

It was contended that this was a concluded and perfect transaction as regarded the transfer of the shares and the compliance with all the formalities prescribed by the deed ; but I do not think that such considerations have any relevancy to the point that I have now to decide, for though this was in terms a transfer to a third person, yet in substance it was a purchase by the company itself, and the name of that third person was used only as a mere trustee ; that transaction undoubtedly might bind both the seller and the general body of shareholders, but this executor could never be heard to say that he was to be treated as an independent seller, standing upon the provisions of the deed of copartnership as to what should be done by an outgoing seller ; for he was not selling in the market and calling on the directors to approve of such a transaction, but he was dealing immediately with the directors themselves, who were in fact the real purchasers, while he was one of the general body of shareholders. Those clauses of the deed referring to the transfer of shares generally, do not apply to this case, and I need not, therefore, embarrass myself with the consideration of what I think after all was made

* 433 * out, that as between third persons this would have been a regular transaction.

It was also contended that the case of *Ex parte Morgan* (a) was distinguishable from the present, inasmuch as in that case the question depended entirely upon the resolution at the extraordinary meeting, while this case depended upon the proceedings at the general meeting, ratifying the imperfect proceedings of the extraordinary meeting; that there the transfer was not perfect, that here it was perfect; but I think that these distinctions cannot influence the judgment which I am now about to pronounce. The Vice-Chancellor in *Morgan's Case* (b) proceeded upon the ground of knowledge and acquiescence in all parties; but when that case came before Lord COTTENHAM, he did not think that ground a solid one, and he reversed that decision. It is clear that the application of the doctrine of acquiescence to such a case must lead to insuperable difficulty, because in dealing with individual members some who are asserting equities which they have precluded themselves from maintaining, may be bound *quâd* partners by particular acts, while the general body would not be bound.¹ I am not, however, embarrassed by any such considerations in this case, because I am of opinion that the extraordinary general meeting was not called with sufficient and explicit notice to enable it to pass the resolution which was there adopted; and that the general meeting had not itself the power to pass the resolution, and therefore that the supposed confirmation of the act could not and did not give it any validity. I am also of opinion that the resolution passed at that general meeting did not extend to this case.

Upon the truth and merits of this case, I am clearly of
* 434 * opinion that this is a transaction which ought not to prevail. I make no imputation at all on the gentleman who unfortunately is still to be a contributory. I have no doubt that in his view it was a *bond fide* transaction, and free from all taint, or fraud, or contrivance, but it was an improper transaction; it was an attempt on his part, shared in by other members of the company who had the command of money, to escape from further liability at the expense of their copartners, and contrary to the

(a) 1 Mac. & G. 225.

(b) 1 De G. & S. 750.

¹ See *Imperial Bank of China, India, and Japan v. Bank of Hindustan, China, and Japan*, L. R. 6 Eq. 91.

express provisions of the deed under which they were all acting. I think that the Vice-Chancellor came to a right conclusion upon this case, which I hold not to be distinguishable from that of *Ex parte Morgan*, (a) and I must therefore dismiss this appeal with costs.¹

In the Matter of SOPHIA WHEELER, a Person of unsound Mind,

AND

In the Matter of The TRUSTEE ACT, 1850.

1852. May 5, 26. Before the Lord Chancellor Lord St. LEONARDS.

The costs of the proceedings for obtaining from the committee of a lunatic a reconveyance of premises mortgaged to the lunatic, will be ordered to be paid out of the lunatic's estate, where the lunatic is beneficially interested in the mortgage-money, and the petition is presented by the committee.²

This rule will not, however, be acted on if the mortgagor presents the petition, unless in cases where the committee has declined to take that step.

This was a petition by Robert Lankester, the committee of the estate of the lunatic, and of Ebenezer Young, a mortgagor of part of that estate, praying that E. Young might be at liberty to pay the mortgage money due into Court, and that thereupon the property, which was leasehold, might be vested in E. Young, free from the mortgage debt, and that the deeds might be delivered up.

On the 20th March, 1851, the Lord Chancellor made an order as prayed; but on the question of costs (as * to * 485 which the prayer of the petition was silent), and whether they were to be paid by the lunatic's estate or by the mortgagor, the matter was ordered to stand over.

Mr. G. M. Giffard, who appeared for the petitioners, now asked that the costs might be paid by the lunatic's estate: he cited *In*

(a) 1 Mac. & G. 228.

¹ See 2 Lindley Partn. (Eng. ed. 1860) 1143, 1144.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1389; *Re Viall*, 8 De G., M. & G. 439; *In re Jones*, 2 De G., F. & J. 554; *Ex parte Marshall*, 4 De G. & J. 317.

re Marrow, (a) *In re Townsend*, (b) *In re Lewes*, (c) *In re Townsend*; (d) submitting also that the position of the lunatic in these cases was similar to that of a trustee, and referring to the Act 7, Geo. 2, c. 20.

Mr. Pitman, for the next of kin of the lunatic.

THE LORD CHANCELLOR observed that he did not see the distinction between the present case and that of a trustee, and intimated that he had, while Lord Chancellor in Ireland, decided the point now raised. His Lordship added that he would look into the matter and state his opinion on a future day.

May 26.

THE LORD CHANCELLOR. — *Ex parte Richards*, (e) before Lord ELDON, seems to dispose of this case, and especially as the committee joins with the mortgagor in the petition. Although that case has been doubted, and certainly I originally should not * 436 * have made such an order, yet as I find both from the reported cases, and the cases not reported which I have had searched for in the office, that it has been repeatedly followed, (g) I do not feel myself at liberty to disturb it; but I think it contrary to principle, and opposed to the settled rule that the costs occasioned by the mortgagee's putting the mortgaged estate in settlement are to be paid by the mortgagor.

I think, however, that the proceedings in such cases as this should originate with the committee and not with the mortgagor; and in future, therefore, unless the committee declines to present a petition, I shall not give the mortgagor his costs.

(a) Cr. & P. 142.

(c) 1 Mac. & G. 23.

(b) 2 Phil. 348.

(d) 1 Mac. & G. 686.

(e) 1 J. & W. 264. In this case Lord ELDON held, that where a mortgagor or committee of a lunatic presents a petition, the lunatic being beneficially interested in the mortgage money, his estate must bear the costs of the proceeding to enable the committee to reconvey. This decision is referred to in the cases cited by Mr. Giffard; and at the close of the argument Mr. T. Edwards (as *amicus curiæ*) mentioned to the Lord Chancellor *Ex parte Clay*, *In re Towers*, noticed in Shelford on Lunatics, page 510, ed. 2.

(g) The following are the unreported cases referred to by the Lord Chancellor:—*Ex parte Stennett* (March, 1831); *Ex parte Huntsman* (February, 1832); *Ex parte Brearley* (July, 1832); *Ex parte Fairthorne* (28 July, 1848);

* *Ex parte* SAVERIO CASTELLI and GIOVANNI BAPTISTA GIUSTINIANI. * 437

In the Matter of FRANK CASTELLI, FRANCISCO FRANCESCOVITCH BRAGGIOTTI, SAVERIO CASTELLI, and GIOVANNI BAPTISTA GIUSTINIANI.

1851. November 20. 1852. January 21. Before the LORDS JUSTICES.

In the phrase "such extended time not exceeding fourteen days in the whole," in the 104th section of the Bankrupt Law Consolidation Act, the words "such extended time" mean "such further time," and the time is to be reckoned exclusively of the original seven days.

The provisions of the section do not preclude the commissioner from adjourning the hearing on showing cause, when it has commenced within the proper time.

THIS was an appeal from the refusal of the commissioner to allow the appellants to show cause against an adjudication in bankruptcy against them and their partners, or to stay the advertisement in the London Gazette.

The petition for adjudication was presented by the respondents, Messrs. Lafuente and Webster, against the appellants, Frank Castelli, Francisco Francescovitch Braggiotti, and their partners, the appellants, Saverio Castelli and Giovanni Baptista Giustiniani.

On the 8th of November, the appellants were adjudged bankrupts, and on the same day a duplicate of the adjudication was served at a house which was stated to be their last known place of abode, they being abroad.

On the 13th of November, the solicitors of the appellants gave to the respondents' solicitor notice that the commissioner had appointed to attend on the 17th November, at the Court of Bankruptcy, to hear and determine, on an application to be then made to him on behalf of the appellants, to suspend the publication of the advertisement, and that the appellants, or some or one of them, would then show cause against the adjudication.

* Accordingly on the 17th of November, 1851, an application was made on behalf of the appellants to be allowed * 438

Ex parte Dawson (11 July, 1849); *Ex parte* Poulton (5 July, 1850); *Ex parte* Dinely (25 April, 1851). In all these cases the lunatic was beneficially interested in the mortgage money; and in all except *Ex parte* Dawson and *Ex parte* Dinely, the petition was by the mortgagor; in those two cases the committee was the petitioner.

to show cause against the adjudication, by showing that the petitioning creditors' debt, under which the adjudication took place, was a separate debt of F. Castelli, or at all events was a debt of F. Castelli and F. F. Braggiotti only, and not a joint debt of the four.

An objection was then taken on behalf of the petitioning creditors, that due notice of the intention to dispute the adjudication had not been given on the part of the bankrupts, inasmuch as it had been given for the 17th of November, 1851, which was beyond the seven days from the service of the adjudication.

The commissioner allowed the objection, and refused to allow cause to be shown on the part of the bankrupts, or any or either of them, against the adjudication, or to suspend the publication of the advertisement.

Mr. Cairns, in support of the appeal, submitted that the commissioner had power to grant any time not exceeding fourteen days, in addition to the seven prescribed by the Act.

Mr. Chandless, for the petitioning creditors.—There ought to have been an application for extended time made before
* 439 the expiration of the seven days. (a) * After the expiration of the time limited by the 104th section of the Act, the commissioner's jurisdiction was exhausted, and he had no power

(a) 12 & 13 Vict. c. 106, § 104. "Before notice of any adjudication of bankruptcy shall be given in the London Gazette, and at or before the time of putting in execution any warrant of seizure which shall have been granted upon such adjudication, a duplicate of such adjudication shall be served on the person adjudged bankrupt personally, or by leaving the same at the usual or last-known place of abode or place of business of such person, and such person shall be allowed seven days or such extended time not exceeding fourteen days in the whole, as the Court shall think fit, from the service of such duplicate, to show cause to the Court against the validity of such adjudication; and if such person shall within such time show to the satisfaction of the Court that the petitioning creditor's debt, trading, and act of bankruptcy, upon which such adjudication has been grounded, or any or either of such matters, are insufficient to support such adjudication, and upon such showing no other creditor's debt, trading, and act of bankruptcy sufficient to support such adjudication, or such of the said last-mentioned matters as shall be requisite to support such adjudication, in lieu of the petitioning creditor's debt, trading, and act of bankruptcy, or any or either of such matters which shall be deemed insufficient in that behalf, as the case may be, shall be proved to the satisfaction of the Court, the Court shall

to grant any further time. With regard to staying the advertisement, the Act is peremptory, and there is no jurisdiction to stay the advertisement beyond the fourteen days, unless the adjudication is annulled.

THE LORD JUSTICE KNIGHT BRUCE.—In my opinion the word “extended” means “further” or “longer,” and I think that the notice dated the 13th of November, of a motion to be made on the 17th of November, was sufficient. The consequence is that, in my judgment, the true construction of the Act of Parliament requires the matter to be gone into and proceeded upon.

* THE LORD JUSTICE LORD CRANWORTH.—I am of the * 440 same opinion, and think that the construction of the Act for which the respondents contended would be harsh, and not according to the natural import of the words, to which the utmost latitude should be given. If for any reason the commissioner thinks fit to extend the time, I think the Act enables him to do so, provided the further time does not exceed fourteen days. If the consideration of the matter is commenced within the fourteen days, the Act does not preclude the commissioner from adjourning it, whenever it may be necessary to do so.

An order was then made for staying the advertisement, and directing that the appellants should be at liberty to show cause against the adjudication.

In pursuance of this order the appellants appeared before the commissioner (*Mr. Holroyd*), on the 26th of November, and on that day and on the 4th of December, to which latter day the further hearing was adjourned, showed cause against the validity of the adjudication.

On the 9th of December, the commissioner disallowed the cause shown by the appellants, and confirmed the adjudication, but stayed the advertisement till the 12th of December.

thereupon order (in the form contained in schedule to this Act annexed, or to the like effect) such adjudication to be annulled, and the same shall by such order be annulled accordingly; but if, at the expiration of the said time, no cause shall have been shown to the satisfaction of the Court for the annulling of such adjudication, the Court shall forthwith, after the expiration of such time, cause notice of adjudication to be given in the London Gazette.”

On the 10th of December, the appellants appealed against this decision by way of petition to annul the adjudication, on the ground of the insufficiency of the petitioning creditors' debt.

* 441 *The Court after hearing *Mr. Cairns* in support of the petition of appeal, and *Mr. Hardy* in opposition to it, directed the petition to stand over in order that the legal validity of the adjudication might be tried in an action.

Ex parte MCBURNIE'S Trustees.

In the Matter of JOHN MCBURNIE, a Bankrupt.

1852. January 28. Before the LORDS JUSTICES.

A trader, being in insolvent circumstances, covenanted by an ante-nuptial settlement to pay 500*l.* to trustees, to be held by them upon trust for such persons as the intended wife should appoint, and subject thereto upon trust for the intended wife for life for her separate use, then for the husband for life, and then as to the capital, in trust for the survivor. The settlement also extended to certain property belonging to the intended wife, who was wholly unaware of the intended husband's insolvency. *Held*, on the husband's bankruptcy, that the settlement was valid against the assignees, and entitled the trustees to prove for the 500*l.*¹

THIS was an appeal from the rejection of a proof under the circumstances stated in a special case, which was settled by the commissioner, and was to the following effect:—

In the month of May, 1850, the bankrupt commenced the business of a draper and tea-dealer, at a shop in Exeter, without any capital. By himself and his assistant he carried on a considerable trade in the neighbouring towns, calling at customers' houses with articles for sale, and in this way opened several small accounts with his customers, who paid small sums on account, on the bankrupt and his assistant going their weekly rounds.

The special case stated it to be customary for persons in the bankrupt's line of business to begin with very little, and

¹ See *Ramsay v. Richardson*, Riley Ch. 271; *Armfield v. Armfield*, 1 Freeman Ch. 311; *Schouler Dom. Rel.* 264.

sometimes without capital, relying on the guarantees * of * 442 their former masters to enable them to gain credit from wholesale houses.

It further stated that in May, 1851, the bankrupt was in difficulties in consequence of the withdrawal of the guarantees which he had had on entering into business, and that he proposed to make an assignment to his creditors of all his estate and effects, but that such proposal was confined to two of his Exeter creditors, who, thinking he might go on, made arrangements for him by which he was enabled to continue his business.

That these arrangements however failed to give the bankrupt the support he expected, and that he stopped payment in October, 1851, owing debts (exclusively of the 500*l.* thereafter mentioned) to the amount of 1302*l.* 19*s.* 10*d.*, of which 800*l.* and upwards had been contracted prior to the date of the settlement, thereafter mentioned, and that his assets consisted of stock and furniture valued at 147*l.* 13*s.* 3*d.*; good debts, 630*l.* 6*s.* 4*d.*; doubtful, 372*l.* 18*s.* 10*d.*; bad, 189*l.* 5*s.* 10*d.*; total property and debts, 1840*l.* 4*s.* 4*d.*. That the probable amount of the assets that would be realized was 365*l.*, in consequence of the peculiar nature of the debts contracted with traders of this class.

That on the 19th of June, 1851, the bankrupt made a settlement in contemplation of his marriage with Maria Harris, his present wife, which was to be treated as part of the special case, whereby one-third part to which she was entitled in possession, in a certain trust sum of 700*l.*, was assigned to trustees upon certain trusts thereafter stated, and whereby the bankrupt, in consideration of the intended marriage, and in pursuance of an agreement entered into in contemplation thereof, covenanted with the trustees to pay them on demand the sum * of 500*l.*, with interest * 443 from the day of the marriage, at the rate of 4*l.* per centum per annum. It was thereby declared that the trustees should stand possessed as well of the one-third part of the 700*l.* as of the 500*l.*, settled by bankrupt upon trust, for such persons as Maria Harris should by deed or will appoint, and in default of appointment, upon trust, during the joint lives of the bankrupt and Maria Harris, to pay the income of the trust funds to her for her separate use, and upon the decease of either the bankrupt or Maria Harris, upon trust, subject to the said power of appointment, to pay the trust funds to the survivor, with power to the trustees to allow the trust

funds to remain outstanding until Maria Harris should otherwise direct.

The special case further stated that by an agreement executed at the same time, the contingent interest of Maria Harris in one-half of another one-third of the same sum of 700*l.* in the event of her brother dying under twenty-one years of age, and also all other property (if any) which might thereafter devolve on her, were agreed to be settled upon the same trusts as the 500*l.*

That at this time the bankrupt was insolvent to a considerable extent.

That the bankrupt's wife, being examined, said, "I was engaged to my husband about nine months before we were married. About ten days previous to our marriage something was said about my property. I was entitled to one-third of a sum of 700*l.* due on mortgage, which I was to receive on my brother's coming of age. My property was to be settled on myself. I did not know McBurnie's circumstances. I wished the settlement to be made

to secure my money to myself. I employed Mr. Every to *444 prepare the settlement. He acted for both of *us. Mr.

McBurnie and I went together to Mr. Every's and instructed him to prepare the settlement. We went to him two or three times about it. No one went with me on my behalf. McBurnie made no statement to me about his affairs or his property. I did not know he was in debt at all. He owed my mother some money. I do not know if it was repaid before we were married. It was my own thought about having my property settled on myself. I told Mr. Every to settle it in the usual way. I gave no directions as to the 500*l.* of McBurnie's. He said he would settle it on me. I did not know how it was to be paid."

The special case stated that the Court saw no reason to doubt the truth of this statement.

That the trustees sought to prove on the bankrupt's estate for the 500*l.* due to them on the bankrupt's covenant, which the assignees resisted, and on the 9th January, 1852, the commissioner rejected such proof.

That the commissioner, in rejecting such proof, said he was of opinion that, on the 19th June, 1851, the affairs of the bankrupt were so embarrassed that the bankrupt could have had no reasonable expectation of avoiding a bankruptcy, but must have expected it to occur, and that at no distant day. That the bankrupt was

unable at that time to pay his then creditors their lawful debts, and that he entered into the above covenant for the express purpose of enabling the trustees to prove under his bankruptcy, and to that extent of delaying and defrauding his creditors of their just and lawful debts, and indirectly of securing to himself a provision out of his own property in the event of bankruptcy, and that such a covenant was therefore void and fraudulent. Looking therefore at the * cases cited in the margin (a) of the special * 445 case, the commissioner was of opinion that the proposed proof could not be admitted; but as the trustees of the settlement wished to have the opinion of the Court of Appeal, the commissioner under the Bankrupt Law Consolidation Act, 1849, section 14, granted the above special case to enable the trustees, by way of appeal, to obtain the decision of the Lords Justices on the proof.

Mr. Shapter, in support of the appeal. — No one of the cases referred to by the commissioner, nor any other case, goes to the extent of holding that a settlement of the husband's property made before and in consideration of marriage, and also in consideration of a settlement of property of the intended wife, and without any notice on the part of the intended wife of any design to defraud the creditors of the intended husband, can be set aside, even if such design existed on the part of the intended husband. And in the present case there is no evidence of any such fraudulent design, except such as the state of the husband's circumstances and the provisions of the settlement may be supposed to furnish. The 126th section of the Bankrupt Law Consolidation Act excepts transactions entered into upon the marriage of the bankrupt's children, or for valuable consideration. And it is well settled that marriage is a valuable consideration. It appears by the special case that the lady was no party to any fraud.

Mr. Bacon, for the assignees. — In *Cadogan v. Kennett*, (b) Lord MANSFIELD said that * if a transaction be not * 446 *bonâ fide*, the circumstance of its being done for valuable consideration will not alone take it out of the statute.

(a) *Higginson v. Kelly*, 1 Ball & Beatty, 252, 5, 6; *Ex parte Cooke*, 8 Ves. 353; *Ex parte Hill*, *Cooke's Bankrupt Law*, 291; *Ex parte Hodgson*, 19 Ves. 206.

(b) 2 Cowp. 434.

In *Campion v. Cotton*, (a) Sir WILLIAM GRANT said, "I do not think it can be inferred from the evidence that she knew he was in such circumstances as to make his bounty to her a fraud upon any one," and on that ground he held the settlement in that case to be good against creditors. But can it be said that a person in the condition of the bankrupt was in such circumstances as to fairly covenant to settle 500*l.* upon his marriage?

Re Meaghan (b) was also referred to.

Mr. Shapter was not called on to reply.

THE LORD JUSTICE KNIGHT BRUCE.—We have to decide as to the effect to be given to a marriage settlement containing no reference to bankruptcy, but containing a simple and immediate covenant on the part of the intended husband.

How the case would have stood if the intended wife had been implicated in any design to defraud the creditors of the intended husband, it is not necessary to say.¹ Nor is it necessary to say what would have been the result if the settlement had been grossly out of proportion to the station and circumstances of the husband.

For this settlement appears to have been one which an honest woman, reasonably advised, might have reasonably supposed to be fair and proper. That seems to dispose of the whole case; * 447 she is not implicated in any fraudulent *intention which the husband may have had. I say thus much for myself; Lord CRANWORTH concurs with me in the conclusion at which I have arrived, that there does not appear in this case sufficient to exclude the proof.

THE LORD JUSTICE LORD CRANWORTH.—I not only concur in the conclusion to which my learned brother has come, but do so for the reasons which he has given. I do not think that the wife was a *particeps criminis*, if fault there was. Here there was not only no fraud upon the bankrupt laws apparent upon the face of the settlement, but its provisions were the fairest possible. The trust for the separate use of the wife was not a provision to awaken

(a) 17 Ves. 268.

(b) 1 Sch. & Lef. 44, 179, 180.

¹ See *Goldsmith v. Russell*, 5 De G., M. & G. 547; *Columbine v. Penhall*, 1 Sm. & Gif. 228; *Simpson v. Graves*, Riley Ch. 232; *Bulmer v. Hunter*. L. R. 8 Eq. 46; *Frazer v. Thompson*, 4 De G. & J. 659.

any suspicion, and the commissioner finds that the intended wife was acting *bonâ fide*. I give no opinion upon the case of a settlement containing on the face of it something so extravagant as that it ought to awaken inquiry. I guard myself against pronouncing an opinion that such a settlement could be insisted upon.

The proof was ordered to be admitted, and the costs to be paid out of the estate.

* *Ex parte* HUGH MATHESON.

* 448

In the Matter of HUGH MATHESON, a Bankrupt.

1852. February 11. Before the LORDS JUSTICES.

Railway stock is within the 201st section of the Bankrupt Law Consolidation Act, which provides that no bankrupt shall be entitled to a certificate who has, within the period mentioned in the Act, lost 200*l.* by any contract for the purchase or sale of any government or other stock.¹

THIS was the appeal of the bankrupt from the decision of Mr. Commissioner Perry, refusing to grant to the petitioner a certificate of conformity. The allowance of the certificate was objected to before the commissioner upon the following grounds: first, of reckless trading; secondly, incurring debts without means of payment; thirdly, the improper keeping of accounts; fourthly, excessive speculation in shares; fifthly, the destruction of books and accounts; and on the further ground that the bankrupt had lost the sum of 200*l.* upon a contract for the purchase of railway stock.

The commissioner, by a memorandum in writing, stated that he had refused the certificate upon the first, second, and fourth of the above grounds, and declared that the bankrupt appeared to him also not entitled to such certificate, he having brought himself within the penal provision of the 201st section (a) of the

(a) "That no bankrupt shall be entitled to a certificate of conformity under this Act, and any such certificate, if allowed, shall be void if such bankrupt shall have lost, by any sort of gaming or wagering, in one day 20*l.*, or within one

¹ See *Ex parte* Wade, 8 De G., M. & G. 241; *Ex parte* Mellor, 8 De G., M. & G. 248; *Ex parte* Copeland, 2 De G., M. & G. 914.

* 449 Bankrupt Law Consolidation Act, 1849, by a loss of *200*l.* within one year next preceding the filing of the petition for adjudication in this matter, upon a contract for the purchase of railway stock, called Leeds stock; and by a loss of 200*l.* within the like period, upon another contract for the purchase of Edinburgh and Glasgow stock, being also railway stock; which two several contracts were respectively entered into by the bankrupt, and were not to be performed within one week after the date of each respective contract.

Mr. Bramwell and *Mr. W. M. James*, in support of the petition. — Railway stock is not within the meaning of the section. In *Hewitt v. Price* (a) it was contended that the 5th section of the Stockjobbing Act (7 Geo. 2, c. 8), which provides that no money shall be paid or received for compounding difference for the not delivering any public or joint-stock or other public securities, applied to shares in a railway company. But *CRESWELL, J.*, said it was difficult to show how the Act could apply to such shares, as they were not public stock or public securities. And accord-

* 450 ing to the intimation of the opinion of the Court in * that case, even the words “joint-stock or other public securities” would not include railway shares. If that view is correct, it concludes the present case. In *Wells v. Porter*, (b) *BOSANQUET, J.*, said, “Where we find the expression ‘public stock,’ we must in-

year next preceding the issuing of the *fiat* or filing of the petition for the adjudication of bankruptcy 200*l.*, or if he shall, within one year next preceding the issuing of the *fiat* or the filing of such petition, have lost 200*l.*, by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract, or if such bankrupt shall, after an act of bankruptcy, or in contemplation of bankruptcy, or with intent to defeat the object of this or any other statute relating to bankrupts, have parted with, concealed, destroyed, altered, mutilated, or falsified, or caused to be concealed, destroyed, altered, mutilated, or falsified any of his books, papers, writings, or securities, or made, or been party or privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors, or shall have concealed any part of his property; or if any person, having proved a false debt under the bankruptcy, such bankrupt being privy thereto, or afterwards knowing the same, shall not have disclosed the same to his assignees, within one month after such knowledge.

(a) 4 Man. & Gr. 355.

(b) 2 Bing. N. C. 722.

tend the public stocks of this country." And as this is a penal clause, it must be construed strictly. In the Bubble Act, 6 Geo. 1, c. 18, much more extensive words are used, such as "transferable stock," "capital stock," and "any stock or pretended stock," and the same would have been introduced into this Act if it had been intended to extend to such securities. Their omission shows the intention of the legislature. Moreover, the words in question were introduced into the bankrupt law before any stock of this description was in existence. Would a trustee, having authority to invest trust moneys upon government or other stock, be justified in investing them upon railway stock?

They also referred to *London Grand Junction Railway Company v. Freeman*. (a)

Mr. Rolt and *Mr. Kinglake*, for the respondents, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE.—The Bankrupt Act of 1849, singularly enough, considering the general import and object of the Act, does not appear to contain a provision found in other Acts of Parliament which preceded it, that the Act shall be construed beneficially for creditors. If that provision had been carried into it, I do not think that any doubt could be entertained on the present case. Still it is a rule applicable to the construction of * all statutes from the earliest time, so to construe them as * 451 to suppress the mischief and advance the remedy. Now, no reasonable doubt exists that railway stock is within the mischief intended to be prevented by the Act, as much or nearly as much as ordinary government stock; and, therefore, ought to be within the remedy. The words are "government or other stock." And railway stock is described by the legislature in other statutes in a way to warrant the application of the term "stock" to it.

It was said, however, that the 201st section is a penal section. I do not wish it to be understood that I agree in that view; but whether it is a penal section or not, I apprehend still that the words must be interpreted as I have said. I think this description of property, "other stock," within the meaning of the statute.

THE LORD JUSTICE LORD CRANWORTH.—I am of the same opin-

(a) 2 Man. & Gr. 606.

ion. I think "other stock" means stock transferable in the books of a company, in the same manner as government stock is transferable in the books of the Bank of England. An argument was attempted to be derived from earlier statutes, where more words are used. But so also in the older Acts for preventing gaming, (a) the different descriptions of gaming are specified, as by cards, dice, tennis, &c. All such enumeration is left out here, probably because in modern Acts the legislature has been in the habit of omitting such enumeration of particulars. Then it was said that stock of this kind cannot be within the meaning of these
 * 452 * words, because when they were first introduced into the bankrupt statutes, shares of this description were not in existence. I think, however, that it would be unsafe to infer that stock of this kind was not intended to be included merely on that ground. With regard to the ingenious argument adduced by *Mr. James* that a trustee for investment in government or other stock would not be justified in investing in this stock, the answer is that a trustee is not justified in investing in foreign stock.

The petition was dismissed, with costs.

Ex parte BATES.

In the Matter of WILLIAM WILLIAMS, WILLIAM WILLIAMS the Younger, and THOMAS ROBERT WILLIAMS, Bankrupts.

1852. February 17. Before the LORDS JUSTICES.

The removal of assignees is a matter within the discretion of the commissioner, with which the Appellate Court will not interfere merely because it doubts whether it would have acted as the commissioner has done.

Therefore, where the commissioner gave the assignees time to consider whether they would remove solicitors whom they had appointed, and who were related to the bankrupt, or would themselves retire, and the assignees declined to do either, and the commissioner removed the assignees, the Court dismissed, with costs, an appeal from the commissioner's decision.¹

(a) See 16 Car. 2, c. 7; 9 Anne, c. 14. In the latter Act the words are "where the whole or any part of the consideration for such conveyances or securities shall be for any money or other valuable thing whatsoever, won by gaming or playing at cards, dice tables, tennis, bowls, or other game or games."

¹ See *Ex parte* Singlehurst, 3 De G. & J. 451.

THIS was an appeal from the decision of Mr. Serjeant *Stephen*, removing the appellants from being assignees of the above-named bankrupts.

The facts were the following, as stated upon the proceedings by a memorandum of the commissioner : —

At a meeting for the examination of the bankrupts on January 21, 1852, Messrs. Prothero & Fox and Messrs. Savery, Clark, & Co. appeared as solicitors for the * assignees, and * 453 upon the question being raised, it was admitted by them and by the assignees, that one of the members of the first-mentioned firm, viz., Mr. Prothero, was first cousin to the wife of one of the bankrupts, viz., William Williams the elder ; and that one of the firm secondly mentioned, viz., Mr. Savery, was uncle to the wife of one of the bankrupts, viz., Thomas Robert Williams.

The commissioner thereupon expressed his opinion that persons standing in such connection with the bankrupts, or any of them, ought not to be appointed as solicitors to the assignees, and the assignees having intimated that they were not prepared to withdraw the appointment of either of the said firms, the commissioner by their consent adjourned the last examination of the bankrupts until Monday, the 9th of February, in order to give them time to consider of the course they should take.

On the 9th of February the last examination of the bankrupts was again adjourned to the 23d of February, and on that day the commissioner gave the following judgment, a memorandum of which was entered upon the proceedings : —

“ The appointment of solicitors made by the assignees in this cause being, in my opinion, objectionable for reasons already stated, and which it is unnecessary to repeat, I think it is also clear that it falls within my province, as the commissioner before whom the petition is prosecuted, to take the objection. I apprehend this to be incident to the general power and duty unquestionably residing in this Court, to superintend the whole course of proceedings in every bankruptcy placed upon its file, and * to see that these proceedings are conducted (so far as the * 454 Court has the opportunity of becoming officially acquainted with what is done) in the manner best adapted to promote the objects of the bankrupt law. Upon the present specific question, viz., whether the Court has power to interfere with the choice made by the assignees of their solicitors, the only argument against

its possessing the power, that occurs to my mind, as carrying with it sufficient colour to require notice, is that the right, which the Court does unquestionably possess of rejecting an assignee whom it may deem unfit to be appointed, is given by the express provision of the Bankrupt Law Consolidation Act, 1849, section 139; and it may be said, perhaps, that the express insertion of such a power leads to the inference that it would not otherwise have existed, and therefore to the inference that the power now in question does not exist. Neither of these inferences, however, seems to be legitimate. The 139th section containing as it does an express enactment that the appointment of assignees may be made by the major part in value of creditors, it became necessary to add the express proviso, in order to obviate the implication that might otherwise have seemed to arise, that this choice was, even in the case of an unfit person, to be absolute and conclusive. But even without the proviso I conceive that this court must have possessed (as incident to the general jurisdiction, with which this Act so largely clothes it, and to an extent so much greater than any preceding Act) the power to reject or remove an unfit assignee. And even supposing the contrary, yet the case of the solicitor is very different from that of the assignee, for the assignee being once appointed, his nomination of a solicitor, unfit for whatever reason to be employed, is a breach of his duty as trustee for the creditors; and on that ground, independently of any other,

* 455 the interference of the Court, in such a case, seems * to be clearly authorized. Besides which, it is to be considered that the Court has a more direct and peculiar interest in the fitness of the solicitor appointed, because that solicitor, when appointed, becomes, as it were, the minister and assistant in effect of the Court itself. For it is laid down on the high authority of Lord ELDON (a) (at a time when bankruptcies were under the immediate cognizance of the Court of Chancery), that the solicitor was to be deemed "a minister of that Court;" and if so it seems to follow, on the same principle, that he is now a minister of the Court in which the petition is presented. It may be added to these considerations, that if I am right in holding the appointment of the assignees, in the present case, to be of a nature tending to compromise the interest of the creditors and the claims of public

(a) 6 Ves. 1.

justice, and if it be indeed true (as contended for) that the Court has no power of interference, then it follows that the creditors and the public remain in this respect without protection; for I am aware of no other quarter in which an original jurisdiction on this subject can be supposed to reside. There would be therefore a great defect in the law; and, although we know that such defects are occasionally discovered, I need scarcely say that they are never to be presumed, and that, in any case of doubt, it is to be taken as more probable that the law has intended its existing institutions to comprise some remedy for a given abuse, than that it has left that abuse wholly unprovided for. "Under the circumstances I should have thought it right to make a formal order on the assignees, directing them to change their solicitors; but as they declared to the Court, at the last sitting, that, in the event of such an order being made, it was their intention not to obey the same, it would seem futile to take that course; and I, therefore, now proceed to order, and do hereby order,* that * 456 the assignees be removed from their office, on the ground of their persisting in the choice of solicitors they have made, and refusing to obey any order that the Court should make for changing their solicitors; and that a sitting be held on the 23d day of the present month, at eleven o'clock in the forenoon, for the choice of the new assignee or assignees; and that the time of the sale of the bankrupts' property, now advertised for the 2d of March next, be enlarged until the 16th of March by advertisement, and I do adjourn the last examination of the said bankrupts until the said 23d day of February."

Against this decision the assignees now appealed.

Mr. Bacon and *Mr. Giffard*, in support of the appeal.—The Act gives to the assignees the power of appointing the solicitor, and as the commissioner cannot interfere with this power directly, he cannot do so indirectly.

[THE LORD JUSTICE KNIGHT BRUCE.—By the 139th section the Court has power to reject any person chosen by the creditors to be assignee, who shall appear to the Court unfit to be an assignee, or to remove any assignee. Does not that show that the removal is in the discretion of the commissioner?]

Still it is a discretion which this Court is bound to control if it appears to have been exercised on wrong grounds. Now, in this case, the commissioner has expressly shown by the reason which he has given for his decision, that his removal of the assignees did not proceed from any objection to them personally, but was inflicted upon them as a punishment for not obeying the dictate of the commissioner in a matter which the legislature has left to the decision of the assignees, and not to that of the commissioner.

[THE LORD JUSTICE LORD CRANWORTH. — Suppose the assignees persisted in employing the father of a bankrupt to be the solicitor of the estate, might not that circumstance render them unfit to continue to be assignees? May not their conduct in selecting a solicitor to the estate be a very material ingredient in determining their fitness to continue in the office?]

If such a principle had existed in the bankrupt law, we submit that it must have been put in force before this time, whereas there is no trace of such a doctrine in any of the authorities. The Court has full power to control the solicitor if he should act with impropriety. Moreover, in such a case it might be a breach of duty in the assignees to continue employing him. But it ought not to be presumed that the mere circumstance of consanguinity would induce a solicitor to act improperly. In this case the partner who acts as solicitor is not in any manner related to any one of the bankrupts.

Mr. Swanston and *Mr. Roxburgh*, for the petitioning creditors, were not called upon.

THE LORD JUSTICE LORD CRANWORTH. — I doubt whether if I had been the commissioner I should have thought it necessary or expedient in this case to remove the assignees. But I do not think the Court should interfere with the exercise of the discretion of the commissioner, unless it is very clearly of opinion that that discretion has been wrongly exercised. The reason why I suggested the case of a father acting as solicitor under his son's bankruptcy was to show that relationship might, in an extreme case, be indisputably a ground of unfitness for the

office. I think we cannot measure in such a question the degrees of relationship, and as the commissioner has exercised a discretion, it seems unfit for us to interfere merely from a doubt in our mind, or in the mind of one of us, whether we should have exercised a discretion in a similar way.

THE LORD JUSTICE KNIGHT BRUCE.—If the commissioner had made an order upon the assignees to change their solicitors, what I should have thought of such an order it is unnecessary for me to say, and I abstain from saying. What he has done in effect I understand to be this. He has said to the assignees, “You are employing persons whom reasons perfectly consistent with their respectability induce me to think it would be more for the advantage of the estate not to employ. I think that, for the interest of the creditors generally, it would be better that other solicitors should be employed. That is my judicial opinion. Will you retire from the assigneeship or employ other solicitors?” The assignees say, “We will neither do one nor the other.” In such a state of things I can only say that I agree in the conclusion at which Lord CRANWORTH has arrived.

Mr. Swanston and *Mr. Roxburgh*, for the petitioning creditors, asked that the appellants might be ordered to pay their costs.

Mr. Bacon said that the petitioning creditors had not been served with the appeal, and had no right to appear. The official assignee only had been served, and he did not appear.

* Their Lordships ordered the petitioning creditors’ costs * 459 to be paid out of the estate.

Ex parte JAMES WHITAKER.

In the Matter of JAMES WHITAKER and JOSEPH CROW-
THER, Bankrupts.

1852. March 2. Before the LORDS JUSTICES.

Semble, that after the commissioner has absolutely refused a bankrupt's certificate, it cannot be referred back to him to review his decision.

THIS was the appeal of one of the bankrupts from the refusal of his certificate.

The bankrupts had carried on business in partnership in Burlingthorpe, in Yorkshire, as dyers. The commissioner had suspended the certificate of one of the bankrupts for three years, and refused to grant any to the appellant; but gave both bankrupts protection after three months of imprisonment.

Mr. Bacon and *Mr. Steere*, in support of the appeal, said that there were facts not before the commissioner which might induce him to alter his decision; and they asked that the matter might be referred back to him.

THE LORD JUSTICE KNIGHT BRUCE referred to the 207th section of the Bankrupt Law Consolidation Act, 1849, and said that he doubted whether the Court had jurisdiction to refer the certificate back to the commissioner to review his decision.

THE LORD JUSTICE LORD CRANWORTH said, that if the
* 460 * commissioner reheard the case and granted the certificate, it would probably be invalid.

Their Lordships, therefore, heard the case with the additional facts, and varied the commissioner's decision by making, with regard to the appellant, a similar order to that made with regard to the other bankrupt, saying that they did not mean to intimate that upon the materials alone which were before the commissioner, they should not have arrived at the same conclusion as he had arrived at.

Ex parte JOHN BOWERS.

In the Matter of JOHN BOWERS, against whom a Petition for adjudication in Bankruptcy has been filed.

1852. January 14. Before the LORDS JUSTICES.

An order under the arrangement clauses of the Bankrupt Law Consolidation Act, granting protection till a day certain, and not till further order, is irregular; and where a trader has obtained an order *ex parte* in that form, it affords no protection against a summons under the 78th section of the Act.¹

THIS was an appeal from an adjudication of Mr. Commissioner Balguy, that the appellant had become bankrupt.

On the 26th November, 1851, the appellant, being a trader within the meaning of the bankrupt laws, presented a petition for arrangement with his creditors, to the District Court of Bankruptcy, for the Birmingham district, under "The Bankrupt Law Consolidation Act, 1849," praying that his person and property might be protected from all process, and that such proposal as he might be able to make, or such modification thereof * 461 three-fifths in number and value of his creditors might determine, might be carried into effect under the superintendence and control of the Court. (a)

(a) 12 & 13 Vict. c. 105, § 211, enacts, "That any such trader unable to meet his engagements with his creditors, and desirous of laying the state of his affairs before them under the superintendence and control of the Court of Bankruptcy, and of submitting himself to the jurisdiction of the Court in manner hereinafter mentioned, may present a petition to the Court, setting forth the true cause of such inability, and praying that his person and property may be protected from all process until further order; and the Court, on such petition, shall have power to grant such protection and may review the same from time to time as it shall think fit."

The 212th section provides —

"That every such petition shall be in the form contained in the schedule (A a.) to this Act annexed."

And the following is the form of the prayer set out in schedule (A a.) to the Act: —

"Your petitioner therefore prays that his person and property may be protected from all process, and that such proposal as he may be able to make, or such modification thereof, as by three-fifths in number and value of his creditors may be determined, may be carried into effect under the superintendence of this honourable Court."

¹ See *Ex parte* Walker, 6 De G., M. & G. 752; *Bellhouse v. Mellor*, 4 H. & N. 116; *Tomline v. Cadman*, 6 C. B., N. S. 733.

On the same day, the district Court granted to the appellant an order for protection from all process whatsoever against his person and property until the 2d February, 1852. After granting the order of protection, the Court appointed a private sitting to be held on the 2d February, 1852, at the Court of Bankruptcy for the Birmingham district, and at the same time appointed an official assignee to act in the matter of the petition.

On the 5th December, 1851, the respondent, John Bower, the petitioning creditor, (a) served upon John Bowers, the appellant, a summons under the 78th section of the Act.

*462 *The appellant did not attend, being advised that, by reason of his having obtained the order for protection, it was not necessary for him to do so. His solicitor, however, attended on his behalf, and stated to the Court the order for protection.

On the 17th December, 1851, the respondent filed a petition for adjudication in bankruptcy against the appellant. A counter petition was, on the 18th December, 1851, presented by the appellant to the district Court, praying that the Court would refuse to adjudicate upon the respondent's petition.

On the 23d December, 1851, the commissioner made the following order upon the counter petition:—

“ Court of Bankruptcy for the Birmingham district. The 22d day of December, 1851. In the matter of John Bowers. Whereas the said John Bowers did, on the 18th day of December instant, present a petition to this honourable Court, praying that the Court would refuse to adjudicate the said John Bowers bankrupt, upon a certain petition for adjudication of bankruptcy, filed in this honourable Court against him. Now, therefore, upon hearing Mr. Smith, solicitor for the said John Bowers, and Mr. Wright for the petitioning creditor, I do order that the said petition of the said John Bowers be dismissed. And I do reserve the questions of the payment of the costs of the petitioning creditor out of the estate of the said John Bowers.
J. BALGUY.”

On the same day the commissioner made an order upon the respondent's petition, adjudicating the appellant bankrupt.

(a) To avoid confusion it should be observed that the name of the bankrupt was John Bowers, while that of the petitioning creditor was John Bower.

* The act of bankruptcy, on which the adjudication was * 463 founded, was the non-attendance personally of the appellant at the time and place stated in the summons.

The appellant gave notice to dispute the adjudication, and it was arranged between the appellant's solicitor and the solicitor for the petitioning creditor, with the consent of the commissioner, that the time for disputing the adjudication should be extended for the full limit allowed by the Act for that purpose.

The commissioner made the order extending the time accordingly, and the appellant thereupon presented the present petition, praying that the order of the commissioner made on the 23d December might be reversed, the petition of adjudication taken off the file, and the costs of the present petition and of that of the 18th December might be paid by the petitioning creditor.

Mr. Swanston and Mr. Motteram, in support of the petition. — There can be no doubt that the summons under the 78th section was a description of process within the meaning of the 211th section. *Anonymous.* (a) It would have been a violation of the Act for the appellant to pay a debt after presenting his petition for arrangement. How then could his omission to pay constitute an act of bankruptcy? The summons under the statute, while the trader was protected in person and property by the same statute, was wholly irregular. The adjudication cannot therefore be supported.

The Solicitor-General and Mr. Baggallay, for the petitioning creditor. — * The order for protection was a nullity, * 464 not being in the terms prescribed by the statute, namely, till further order, but to a fixed day more than two months after the date of the order.

[THE LORD JUSTICE LORD CRANWORTH. — If the order ought not to fix a day, what is the meaning of the provision, as to enlarging the protection from time to time?]

At all events it should have been till a fixed day or further order. The commissioner has no authority to preclude himself from subsequently abridging the time, if there shall be occasion. The con-

sequences of such a practice would be most serious to the interests of creditors, and might render it impossible for a creditor to make his debtor a bankrupt; for suppose that before obtaining such an order the debtor had been served with a summons under the 78th section, he would in that case be protected, during the continuance of the order, from any proceeding; and after the order has expired, if it was granted for two months, as it has here been, it would be too late to file a petition for adjudication founded on the debtor's default in obeying the summons, as the creditor is bound to proceed under the Act within two months of the default. Besides, the order appointing an official assignee in this case contains no direction to the assignee to get in or secure the assets, so that, for a period of two months, the debtor will retain the control and dominion over his effects, to the injury and loss of his creditors. The Act must be construed strictly and for the benefit of creditors. The arrangement clauses are only intended to take effect where no creditor moves, and are not intended in any way to interfere with proceedings under the Act at the instance of creditors.

* 465 *Mr. Swanston*, in reply. — * Unless the Act is inoperative the order is good. The 211th section of the Act does not, it is submitted, make it imperative upon the commissioner, in granting an order for protection, to adopt the words "till further order." That section of the statute provides that a debtor unable to meet his engagements "may present a petition to the Court setting forth the true cause of such inability, and praying that his person and property may be protected from all process until further order; and the Court on such petition shall have power to grant such protection, and may renew the same from time to time as it shall think fit." And the 212th section enacts, that every such petition shall be in the form contained in schedule (A a.) to the statute annexed. The form of prayer of the petition set out in this schedule is simply for protection "from all process," without any specification as to time. The words "such protection," occurring in the 211th section, describe the sort of protection; viz., protection of the person and property to be afforded, and not the duration of that protection. The provision enabling the commissioner to renew the protection from time to time points expressly to protection for a definite time, and shows that, although the commissioner is not bound to fix, yet he may fix a period for its duration. It was unnecessary to add "or

till further order," since it is inherent in a tribunal to vary an order made by it *ex parte*, on proper cause being shown. The Act must be taken as giving a discretion to the commissioner as to the form of the order to be made, and he must have authority to adapt it to the circumstances of the case. If he has such a discretion, the Court, in the absence of proof to the contrary, will presume that it has been rightly exercised. He may also at any time direct the official assignee to collect and get in the assets.

* In the *Anonymous Case (a)* which has been referred to, * 466 the order was made for protection till a day certain, and this is the general practice.

THE LORD JUSTICE KNIGHT BRUCE. — How this case would have stood if the order of November had granted protection to the debtor till further order, or had granted protection till a certain day or further order, it is not necessary for me to say. In point of fact the order obtained is an order absolutely and unconditionally granting protection till a certain fixed day, more than two months after the day of granting it. Now such an order may or may not be a nullity. Upon that I give no opinion except this, that if it is a nullity there is an end of all question. But assuming it not to be a nullity, I apprehend it still to be irregular, and I apprehend that where a person proceeds *ex parte* to obtain an order for his own benefit, to the prejudice, in a certain sense, of his creditors, and in the absence of those creditors, he is bound to obtain an order strictly correct and regular, and if he does not, he must abide the consequence. The proceedings which have been taken to make the petitioner a bankrupt may or may not be valid, may or may not be regular. With this we do not interfere. With the petitioner's power to resist such proceedings, if he can, we do not interfere. In Lord ELDON's time the fact that a commission was proved to be legally invalid was not always sufficient of itself to induce him to supersede it. To those acquainted with the Court at that time, it is well known that, in several cases where a commission of bankrupt was confessedly invalid, he nevertheless left the parties to do what they could with it, and refused to interfere. So here, being of opinion that the bankrupt has obtained * an order *ex parte*, and that the order so obtained * 467

is one in which there is a serious and important irregularity, I am disposed not to disturb what the commissioner has done.

THE LORD JUSTICE LORD CRANWORTH.—I am of the same opinion. Had it not been for the form (A a.) in the schedule to the statute, there could have been no doubt of the irregularity of the order. But I confess I think the petition cannot be treated as irregular, having been presented in the form authorized by the Act.

The proceeding is not invalid so far as the form of the petition is concerned. What, however, is the order? Whether it should have been till a given day or further order, or simply till further order, it is unnecessary to discuss. The order made in this case is a positive order for protection up to a particular fixed day, thus tying up the hands of everybody in the mean time, and such an order is not in the form authorized by the statute, and is one which there is no authority to make. Consequently the debtor, who has obtained this order *ex parte* and behind the backs of his creditors, ought not to be permitted to avail himself of it. The appeal must be dismissed with costs. (a)

In the Matter of JOHN BOWERS, against whom, &c.

1852. March 10. July 24. Before the LORDS JUSTICES.

In particulars of demand served by a fruit merchant on a grocer together with a summons under the Bankrupt Law Consolidation Act, the word "goods" was held to describe the wares supplied, sufficiently to prevent an adjudication from being annulled, on the ground of uncertainty in the particulars.

What is convenient certainty depends on the situations of the parties as well as the nature of the demand. Under the new Act, as under the former law, it is not sufficient ground for annulling an adjudication that its legal validity may be subject to doubt.

AFTER the dismissal of the appeal in the last case, John Bowers, the then appellant and present respondent, appeared, by his

(a) See the next case.

(b) See *ante*, p. 461, note (a).

attorney, before the district Court to show cause against the adjudication, and contended that there had been no act of bankruptcy; that relied upon being the failure on the part of the debtor to comply with the requisitions of the 80th section of the Bankrupt Law Consolidation Act, 1849, after service of a summons and particulars of demand. The latter of these documents was in the following terms:—

“The Bankrupt Law Consolidation Act 1849.

“Particulars of Demand and Notice requiring Payment. .

“To John Bowers, of the city of Worcester, in the county of Worcester, Grocer, Dealer, and Chapman.

“The following are the particulars of the demand of the undersigned John Bower, of No. 8, Botolph Lane, in the city of London, Fruit Merchant, against you the said John Bowers, amounting to the sum of sixty-six pounds nine shillings and one penny.

| * 1851. | | £ | s. | d. | * 469 |
|-----------|-----------------------|-------|----|----|-------|
| April 14. | To Goods | 20 | 10 | 0 | |
| June 9. | do. | 17 | 0 | 4 | |
| Oct. 8. | do. | 36 | 1 | 9 | |
| | | <hr/> | | | |
| 1851. | | 73 | 12 | 1 | |
| Oct. 6. | Cr. by Cash | 7 | 3 | 0 | |
| | | <hr/> | | | |
| | | 66 | 9 | 1 | |
| | | <hr/> | | | |

“Take notice that I the said John Bower hereby require immediate payment of the said sum of sixty-six pounds nine shillings and one penny.

“Dated this second day of December, in the year of Our Lord 1851.

(Signed)

“JOHN BOWER,

“Carrying on business at No. 8, Botolph Lane,
in the City of London.”

As stated in the report of the last case, the debtor did not attend, and after the lapse of the statutory period the petition for

adjudication was filed, and the adjudication was made on the 23d of December, 1851.

A duplicate of the adjudication was served upon the debtor, upon the same 23d of December; and on the same day, notice was served upon the petitioning creditor's solicitor by the solicitor of the debtor, that it was the intention of the latter to dispute the adjudication, and that he and the solicitor would attend the Court for that purpose on the 29th of December, 1851.

On the 29th of December, 1851, Mr. Commissioner Balguy, upon the application of the solicitor of the trader, extended * 470 the time for disputing the adjudication * until the 12th of January, 1852. Subsequent adjournments were directed, to afford time for the appeal reported *ante*, p. 460, to be heard. On the 2d of February, 1852, the former appeal having been disposed of, cause was shown before the commissioner, who ordered that the adjudication of bankruptcy made against John Bowers should be reversed. By the written memorandum made by the commissioner of his decision, the only ground of it specifically mentioned was, that the act of bankruptcy upon which the adjudication proceeded was insufficient to support such adjudication, inasmuch as the affidavit (filed at the return of the trader debtor's summons) did not state that the summons was served on the trader "between the hours of nine o'clock in the forenoon and nine o'clock in the evening" (as is required by the 30th order of November, 1842), and that, therefore, his non-attendance was no default.

Upon the occasion of the attendance to show cause against the adjudication, the trader was examined and deposed, with respect to the item 36*l.* 1*s.* 9*d.*, that he had purchased the goods which were the subject of that charge from the petitioning creditor at two months' credit, and had received an invoice which had at the top of it the words "cash in two months." He further deposed that he had given the petitioning creditor a bill for part of that amount, which he had received from a customer, and had paid the balance, and that the two months' credit had not expired when the notice of demand was served upon him.

The petitioning creditor appealed against the reversal of the adjudication, and it was agreed that no objection should be taken as to the reversal being made within the proper period, if it was correct in other respects.

* *Sir W. P. Wood* and *Mr. Baggallay*, for the petition- * 471
ing creditor. — Although the 30th order of November 12, 1842, requires that the summons shall be served between the hours of nine in the morning and nine in the evening, it does not require that there shall be an affidavit of this fact at any given time. It is not even required that any affidavit of service should be made upon the return of the summons, and at all events in London it is not the practice to make any such affidavit until the adjudication, when of course the service is proved, although the London commissioners do not require it even then to appear upon the affidavit that the service was effected between nine and nine. It is now proved that in this case the summons was in fact served between those hours, and there never has been any doubt of this fact.

Their Lordships desired, before hearing further the argument in support of the appeal, to hear the counsel for the respondent.

Mr. Swanston, for the trader debtor. — It is not sufficient that the service should have been actually made between the prescribed times, for unless the commissioner had before him, when he made the adjudication, evidence that the orders of the Court had been complied with, he had no authority to adjudicate, and the adjudication is invalid. It cannot be supported by evidence subsequently supplied; and so the commissioner himself thought. But independently of this objection, the whole of the proceedings relied upon as the foundation of an act of bankruptcy are invalid. In the first place, according to the 22d order of November 12, 1842, the account in the particulars of demand must be * “expressed with reasonable and convenient certainty as * 472 to dates and all other matters.” The object of this order was undoubtedly to enable the alleged debtor to be ready with the means of controverting each particular. *Ex parte Greenstock* (a).

[THE LORD JUSTICE KNIGHT BRUCE. — Has the bankrupt made an affidavit that he was misled by the particulars, or prevented from setting up a defence to any part of the demand?]

(a) 1 De Gex, 230, where the rules in question are set out.

[THE LORD JUSTICE LORD CRANWORTH. — Can any general rule be laid down *a priori*, applicable to every case? Or may not particulars which would give sufficient information to one debtor be insufficient as to another? Take, for instance, the debtor himself and his executor. May not a bill be sufficient for one which would not give information full enough to the other? The words “convenient certainty” must (as it seems) be construed with reference to the information already possessed by the person addressed.]

In the present case, there is no certainty whatever, but merely so vague a generality of description that any demand might be set up under it without affording the alleged debtor any means of defending himself; whereas the order requires a reasonable and convenient certainty as to dates “and all other matters.” Another objection is that the term of credit had not expired, so that when the affidavit of debt was made, it was incorrect. The summons itself was also defective, for the 28th order of November 12, 1842, provides, that where the attorney suing out the summons shall not be an attorney of the Court of Bankruptcy, the summons
 * 473 shall be indorsed * with the name and place of residence of the attorney, whereas in the present case his name and place of business only were indorsed upon it.

Sir W. P. Wood and *Mr. Baggallay*, for the petitioning creditor, were not further called upon.

THE LORD JUSTICE KNIGHT BRUCE. — As observations have been made during the argument upon *Ex parte Greenstock*, it may not be out of place to observe, that whether all the reasons given for the judgment in that case are sustainable or not, the conclusion appears to me to have been correct; namely, that it would have been better that there should not have been an adjudication upon the materials which there existed. The amount of the demand was 132*l.* 15*s.* 2*d.* Now it was requisite, with reference to what had been sworn upon the affidavit, that the whole of this should appear to have been due for goods sold and delivered. But upon the account set out in the particulars of demand, as much as 122*l.* 9*s.* 6*d.* of the total amount was due for bills returned, and interest upon these bills, which (however the truth might have been) were

not shown upon the particulars of demand to have been given for goods sold and delivered. Therefore out of 132*l.* 15*s.*, the particulars were, as to so large a portion as 122*l.* 9*s.* 6*d.*, plainly defective with reference to the affidavit. With regard to the small remaining portion of the debt, being 10*l.* 5*s.* 8*d.* only, it was doubtful whether the dates were sufficiently set forth. I agree that the date 1845 was at the head of the particulars; but when the separate items were looked at, if all of them belonged to the year 1845, they were not chronologically arranged, and this gave rise to a doubt as to what dates were meant. There were items in September and October, and then several in August, separated from the former. Now *I was not persuaded *474 that it was a necessary inference from an account so prepared, that the month of August, 1845, so placed below and separated from September and October, was the month meant. If that was not so, the adjudication would on that ground have been insufficiently supported. But if it could have been legally supported, still this jurisdiction is not bound to suffer every adjudication which may be legally valid to remain; and I am of opinion that the Court there rightly exercised its jurisdiction, in declining to give effect to the proceeding relied upon as the foundation of an act of bankruptcy. All the reasons there assigned for the decision (I repeat) may possibly not be sustainable; upon that point I give no opinion. But I adhere certainly to the conclusion.

In the present case, several objections have been made to the proceedings relied upon as the foundation of an act of bankruptcy. The most serious objection appears to me that founded on the form of the particulars of demand, which is a point on which the decision of the commissioner did not proceed, or is not expressed to proceed. It appears to me that a set of particulars of demand sent out by a trader to one individual may be sufficient, which would have been insufficient if sent to another, although the demand might in nature or character be the same. The question in each case must be whether the particulars communicate a reasonably sufficient degree of information to the alleged debtor as to the demand. Now in *Ex parte Greenstock*, the information may or may not have been sufficient. But here, considering what goods were furnished, considering the stations in life of the alleged debtor and creditor, and the words of the particulars of demand,

my impression is that they were sufficient in the particular circumstances of this case. And I am of opinion that the * 475 particulars * are not vitiated legally because they contained one claim which is not sustainable, either because the debt claimed is not due at all, or because it was not actually due at the time of the demand, whatever effect such an error ought to have in the exercise of the discretion of the Court upon an application not grantable *ex debito justitiæ*.

The commissioner, however, was here executing a jurisdiction given or continued by the 104th section of the recent Act of Parliament, which provides thus. [His Lordship read it (see *ante*, p. 216, note).] Now suppose this case to arise (which occurred frequently in former states of the bankrupt law), that the bankruptcy being in question before a Court having jurisdiction to annul it, the legal validity was doubtful. In such a case under the former law, the Court having this jurisdiction was not in the habit of annulling, unless there were some circumstances to induce the Court so to exercise its discretion beyond the legal doubt. If there were no such circumstances, the legal doubt was not sufficient ground for annulling; for this — though possibly not only for this — reason, that the mischief arising from the continuance of the bankruptcy, if unsupported by legal requisites, was remediable, whereas that arising from annulling the proceedings, if the bankruptcy was valid, might have been irremediable. Now I consider that the Court is, in the present case at least, in the position which I have supposed. There is an arguable objection against the validity of the adjudication in point of law. But I am not only not satisfied that the objection is sustainable, but the inclination of my opinion is against its sufficiency. Therefore, as I apprehend, it is not the duty of this Court to annul the adjudication, but the proper course is to leave the bankrupt to question the adjudication as he may think fit, giving him every * 476 facility to * proceed at law for that purpose. Here every consideration, as to the consequences of annulling the bankruptcy, seems to be against taking that step. The result is that, in my opinion, so far as this objection is concerned, the adjudication must stand unreversed, and if so with reference to this objection, the same must be the decision with reference to others which have been taken, and which are much less deserving of attention.

THE LORD JUSTICE LORD CRANWORTH concurred.

The order was, that the order of reversal of the 2d of February should be reversed; that the appellant should be at liberty, within three weeks from the date of the drawing up of the order of their Lordships, to bring an action to try the validity of the adjudication; that the advertisement should be stayed in the mean time, and that the petition of appeal should in other respects stand over.

The appellant afterwards obtained an extension of the time for bringing an action, on the ground of special circumstances relative to a change of his solicitor.

On the 1st of May, the commissioner made an order adjudging the appellant a bankrupt under the arrangement clauses of the Bankrupt Law Consolidation Act. The appellant then presented a petition appealing from this order, and also seeking a further extension of time.

July 24.

On this day the last-mentioned petition came on to be heard, and was ordered to stand over with the other petition till further order, except that the stay upon the advertisement was to be removed.

* *Ex parte* ROBERT HESLOP.

* 477

In the Matter of JAMES ATKINSON, a Bankrupt.

1852. March 3. Before the LORDS JUSTICES.

A mortgagee of goods under a power of sale allowed the goods to remain in the order and disposition of the mortgagor, until the latter committed an act of bankruptcy, but took possession before any petition of adjudication was filed. On the mortgagor being found bankrupt, the messenger took the goods out of the mortgagee's possession and sold them. The mortgagee brought an action of trover and recovered, on the ground that, under the Bankrupt Law Consolidation Act, 1849, the assignees could not sell, without an express order of the commissioner, goods in the reputed ownership of a bankrupt.¹ The assignees applied to the commissioner, who made an order retrospectively

¹ See *Ex parte* Barlow, 2 De G., M. & G. 921; *Quartermaine v. Bettleston*, 13 C. B. 138; *Ex parte* Lucas, 3 De G. & J. 113.

confirming the sale, and reciting as a fact that the goods were in the order and disposition of the bankrupt at the time of the bankruptcy, with the permission of the true owner. *Held*, that the mortgagee was not entitled to have the order discharged on his appeal, as being invalid on the face of it; and on the appellant declining to enter into the question whether he had notice of the act of bankruptcy, when he took possession, his appeal was dismissed with costs.

Held also, that the time of the commissioner signing and delivering out an order, and not the time of his pronouncing it, is its true date with reference to an appeal.

THIS was an appeal from an order made by Mr. Commissioner Ellison, directing a sale of goods, which were in the order and disposition of the bankrupt at the time of his bankruptcy, and had been in fact already sold by the assignees. The order had been made under the following circumstances:—

The bankrupt up to the time of his bankruptcy kept an inn at Newcastle-upon-Tyne. The act of bankruptcy was committed by his departing from home on the 30th of August, 1850. The petition for adjudication was filed on the 9th of September, 1850, and he was on the same day adjudged a bankrupt; official and creditors' assignees had been appointed.

Four years before his bankruptcy, the bankrupt had granted to the appellant a bill of sale of his property, furniture and stock in trade, as a security for a debt due to the appellant for wine and spirits supplied to the bankrupt, who was, however, permitted * 478 by the appellant * to remain in possession, and to have the apparent ownership of the goods.

On the 4th of September, the appellant took possession of the goods under his mortgage deed, but before making any sale was displaced by the messenger under the adjudication. The assignees then sold the furniture and effects in the house to an incoming tenant, and received the proceeds, which were standing to the credit of the estate of the bankrupt.

The appellant brought an action of trover against the assignees, which was tried before Mr. Justice CRESSWELL, at Newcastle, at the spring assizes for the year 1851, when the jury found that the property in question was in the reputed ownership of the bankrupt at the time of his bankruptcy, and found a verdict for the assignees; but at the close of the defendant's case, an objection was taken by the appellant's counsel, that under the "Bankrupt Law Consolidation Act, 1849," § 125, the assignees could not take property

in the order and disposition of the bankrupt, without an order of the commissioner, and that such property did not vest in the assignees without such order, and could be dealt with only by means of it. The point, being reserved, came on to be argued before the full Court of Exchequer, on a motion for a new trial. In July, 1851, Mr. Baron PARKE delivered the judgment (a) of the Court (Mr. Baron PLATT not concurring), which was to the effect that in the case of chattels in the reputed ownership of a bankrupt, there must be an order under the section referred to for the sale and disposal thereof by the assignees before the property in the goods can pass, and a new trial was accordingly awarded, but which had not yet been had.

* The assignees then applied to the commissioner in *479 bankruptcy to make an order for the sale of the goods in question, being advised that such order if made would be retrospective in its effect, and would give validity to the sale already made.

An order was accordingly made, dated the 9th of December, 1851, by the Court of Bankruptcy for the Newcastle-upon-Tyne district, whereby, after reciting to the effect above stated, the Court did, upon consideration of the matters, find and adjudge that the bankrupt committed an act of bankruptcy, and became bankrupt on the 30th of August, 1850, and that, at the time when he so became bankrupt, he had, by the consent and permission of the appellant, who then and still claimed to be the true owner thereof, in his (the bankrupt's) possession, order, and disposition, the goods and chattels in the now-stating order particularly mentioned and set forth, whereof he, the said bankrupt, was reputed owner, and the District Court of Bankruptcy did thereby, according to the Bankrupt Law Consolidation Act, 1849, and in exercise of the power thereby in that behalf given, order the goods and chattels which the bankrupt, at the time when he became bankrupt, by the consent and permission of the petitioner, as owner thereof, had in his, the bankrupt's possession, order, or disposition, or whereof he, the bankrupt, was reputed owner as aforesaid, to be sold and disposed of by Thomas Baker, John Hall, and Richard Attree Johnson, the assignees, for the benefit of the creditors of the bankrupt under the bankruptcy, and also so far as the Court

(a) See *Heslop v. Baker*, 6 Exch. 740.

could and lawfully might, but not further or otherwise, the Court did thereby order and direct that the goods and chattels thereinbefore specified should be vested in Thomas Baker, John Hall, and Richard Attree Johnson, as such assignees as aforesaid; and the

Court did thereby ratify and confirm all acts theretofore
* 480 * done by the assignees in and about the seizure, sale, and disposition of the goods and chattels thereinbefore specified, so far as such seizure, sale, and disposition had been well and properly conducted, and did order and direct that the proceeds of such goods and chattels, so sold and disposed of, should be held and applied by the assignees for the benefit of the creditors of the bankrupt under the bankruptcy.

The order, although dated the 9th of December, was not signed by the commissioner till the 28th of January following, the signature having been postponed by the commissioner in order to afford time to appeal against the order. It was represented to the commissioner on behalf of the appellant that the date of the order would, if unexplained, defeat the appeal, and the commissioner thereupon made another order, dated the 13th of February, 1852, reciting, among other things, that on the 9th of December, 1851, when the commissioner gave his judgment, he directed that his order should be drawn up, and considering that it would necessarily occupy a considerable time to reduce the same into writing, he further directed that for the purpose of giving time to the appellant to appeal against his order, if he should be advised so to do, the date of it should be considered to be the day when it should be signed and delivered to the appellant's solicitor, and reciting that his order was not drawn up, signed, and delivered to the petitioner's solicitors until the 28th of January, 1852, the commissioner, upon the application of the appellant's agent, so far as he could and lawfully might, did thereby order and direct that, for the purpose of enabling the appellant to present such petition of appeal, the date of the former order should be deemed and taken to be the 28th of January, 1852.

* 481 * *Mr. Swanston* and *Mr. Bichner* appeared in support of the appeal from the order dated the 9th of December.

Mr. Bacon and *Mr. Tripp*, for the respondents, objected that the appeal was too late, and that the date of the order, being that of

the day on which the commissioner pronounced it, must be taken to be the correct date. They submitted that the commissioner had no jurisdiction by postponing the formal act of signature to enlarge the limits which the legislature had fixed to the time for appealing.

The Court held that the day on which the order was signed by the commissioner must be considered to be its proper date.

Mr. Swanston and *Mr. Bichner*, for the appellant. — The judgment of the Court of Exchequer has decided that the act of the assignees in selling the goods which belong to the appellant under his bill of sale was wrongful, as it clearly appears to have been under the new Act. It is not competent for the Court of Bankruptcy, by an *ex post facto* proceeding to render the sale good. The appellant has a right to apply to the jurisdiction in bankruptcy to have removed out of his way this order as being bad upon the face of it. The finding of the jury and the state of facts appearing upon the order are insufficient to make out a title in the respondents, independently of the point which was decided adversely to them by the Court of Exchequer, for it is not enough to give the Court of Bankruptcy authority to dispose of the goods of a stranger to the jurisdiction, that those goods should be in the order and disposition of the bankrupt at the time of the bankruptcy. If the true owner has, after the bankruptcy and without notice * of it, taken possession of his goods before * 482 the filing of a petition for adjudication, he cannot be deprived of them by the operation of the reputed ownership clause.

They cited 12 & 13 Vict. c. 106, § 133, and *Ex parte Styan*, (a) *Pariente v. Pennell*, (b) and *Young v. Hope*, (c) decided upon the corresponding enactment, 2 & 3 Vict. c. 22.

[The Lord Justice KNIGHT BRUCE inquired whether the appellants wished the case to be discussed with reference to the questions of notice of the act of bankruptcy and the time when possession was taken.]

Mr. Swanston and *Mr. Bichner* said, that they were not prepared to go into the facts bearing upon those questions, and desired to

(a) 2 M. D. & D. 219.

(b) 2 Moo. & Rob. 517.

(c) 2 Exch. 105.

have the decision of the Court as to the validity of the order with reference to the facts stated upon the face of it.

Their Lordships, without calling on the counsel for the respondents, held that these facts did not invalidate the order, and dismissed the appeal with costs.

*488 * *Ex parte* THOMAS ORFORD AND JOHN ORFORD ;

AND

In the Matter of PHILIP RUFFORD, FRANCIS RUFFORD,
AND CHARLES JOHN WRAGGE.

1852. March 3. Before the LORDS JUSTICES.

By the rules of a friendly society it was provided that there should be appointed a treasurer or treasurers, in whose hands should be deposited all the cash belonging to the society, until the same should be placed out at interest; and that, as soon as a sufficient sum should be collected, it should (after leaving in the club box a sufficient sum to pay the sick and other expenses of the society) be deposited in the hands of the treasurer or treasurers of the society, and that the clerk and two stewards should take the same to the bank. No formal appointment of treasurer was made, but the moneys of the society were paid into a bank. *Held*, that the bankers were not "employed" as officers of the society, so as to entitle the society upon their bankruptcy to payment in full.

THE bankrupts were bankers carrying on business under the style or firm of Rufford & Wragge, at Stourbridge in Worcestershire, and this was an appeal from the refusal of the commissioner to order payment in full out of their estate to the appellants, who were the stewards of a friendly society held at the Star Inn in Oldswinford.

The rules of the society were, on the 19th of December, 1835, duly allowed, certified, confirmed, and enrolled under the Acts relating to friendly societies.

By rule 2 it was provided, "That there shall be a book or books of account kept by a clerk to be appointed by a majority of the members, who shall be allowed a yearly salary, and if he shall neglect to attend to the business of this society after he shall be

so appointed, or wilfully, designedly, or negligently defraud or attempt to defraud this society, or any member thereof, he shall make good any loss, damage, or deficiency that may be occasioned by such neglect or defraud, and be expelled the society."

* By rule 3 it was provided, "That there shall be a * 484 treasurer or treasurers appointed in like manner as the clerk, but who must not be a member or members of this society, in whose hands shall be deposited all the cash belonging to this society till the same can be placed out at interest upon satisfactory security to be obtained for that purpose."

By rule 21 it was provided, "That as soon as a sufficient sum of money shall be collected, the same shall (after leaving a sufficient sum in the club box to pay the sick and other expenses of the society) be deposited in the hands of the treasurer or treasurers of this society, and that the clerk and two stewards shall take the same to the bank, for which they shall be allowed one quart of ale each; and if any member shall, on any pretence whatever, draw any money from the bank, except the clerk and two stewards are present, he shall be expelled, and make good what he has drawn therefrom."

It was not alleged that the bankrupts had been appointed to be treasurers or officers of the society; but the appellants alleged by their petition and affidavit that the bankrupts were employed in the office as treasurers of and in the society, and had in their hands and possession at the time of the adjudication of bankruptcy, by virtue of their office and employment, certain moneys belonging to such society, amounting to the sum of 132*l.* 0*s.* 11*d.*, and that this money was in the hands of Philip Rufford, Francis Rufford, and Charles John Wragge, not as bankers of the society, and in the ordinary way of their banking business, but wholly as treasurers of the society.

Mr. Bacon and Mr. Renshaw, in support of the petition. —

* The 167th section (a) of the Bankrupt Law Consolidation * 485

(a) 12 & 13 Vict. c. 106, § 167. That if any person already appointed or employed, or who may be hereafter appointed to or employed in any office in any society established under any of the Acts relating to friendly societies, and being intrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his office or employment, any moneys or effects belonging to such society, or any deeds or securities relating to the same, shall have been,

Act, 1849, differs from the former enactments with respect to these societies. Former statutes required that the bankrupt should have been "appointed" to an office in the society to entitle the society to payment in full. But the present Act only requires that he should be "appointed to or employed in" any office in the society. This distinguishes the case from *Ex parte Harris*.(a)

They also referred to *Ex parte Riddell*.(b)

Mr. Swanston and *Mr. J. V. Prior*, for the respondents, were not called upon.

The Court held that the bankrupts were not employed in any office within the provision of the Act, and dismissed the appeal with costs.

In the Matter of JOHN WILKINSON, a Bankrupt.

1852. March 11. Before the LORDS JUSTICES.

A petition to annul an adjudication may be presented by a creditor to the commissioner, and it is sufficient if he appeal from the commissioner's decision upon it, within twenty-one days, although much more time may have elapsed since the adjudication.

The circumstance that an order to annul will leave unimpeached an assignment of all the bankrupt's effects to the creditor applying for the annulling order is not sufficient ground for refusing to annul an adjudication unsupported by the legal requisites.

THIS was the appeal of a creditor from the decision of the commissioner, dismissing the appellant's petition seeking to have the adjudication annulled.

or shall become bankrupt, the Court shall, upon application made by the order of any such society or any committee thereof, or the major part of them assembled at any meeting thereof, order payment and delivery over to be made to such society, or to such person as such society or committee may appoint, of all moneys and other things belonging to such society, and shall also order payment out of the estate and effects of the bankrupt of all sums of money remaining due, which the bankrupt received by virtue of his said office or employment before any other of his debts are paid and satisfied."

(a) 1 De G. 162.

(b) 3 M. D. & D. 80.

The adjudication took place on the 12th of May, 1851, upon the petition of Thomas Bittleston and John Watson, the assignees of another bankrupt, named Thomas Wakefield. On the 30th of June the appellant presented his petition to have the adjudication annulled for want of an act of bankruptcy, or of a sufficient petitioning creditor's debt. On the 11th of July, 1851, the day appointed for hearing his petition, he attended the District Court. On the same day a sitting took place for the proof of debts, and the petitioning creditors tendered proof of their alleged debt, which was opposed by the assignees. The commissioner, after hearing evidence and examining witnesses thereon, ordered the proof to be admitted for 1291*l.* 14*s.* 3*d.*

At the rising of the Court the commissioner directed the appellant's petition to stand over until the 15th of August.

On the 15th of August, 1851, the petition came on for hearing, but was further adjourned on account of the *pen- * 487 dency of an appeal of the assignees from the admission of the proof of the petitioning creditors' alleged debt.

The appeal of the assignees was heard by the Lords Justices on the 11th of December, 1851, when an order was made thereon, whereby it was declared that no evidence had been brought before the Court on which the proof of the sum of 1291*l.* 14*s.* 3*d.* could be sustained. And it was amongst other things ordered that the proof should be expunged from the proceedings, and that the costs of the appeal should be paid out of the estate of the bankrupt Thomas Wakefield.

On the 20th of February, 1852, the appellant's petition again came on before the commissioner, who dismissed it with costs.

In giving judgment the commissioner referred to *Ex parte Maxwell*, (a) and said that, upon this authority, it appeared that the Court had a discretion to accede to or refuse the application, and that it would not be exercising a proper discretion if it annulled the adjudication. The commissioner then referred to an assignment which had been referred to as having been made in the month of August, 1847, to Bean of all the bankrupt's property, which the commissioner regarded as an act intended to operate in favour of the appellant, and to operate certainly to the prejudice of all the other creditors. As the effect of annulling the proceed-

ings would be immediately to give to the appellant the benefit of this transaction, the commissioner held that the circumstances of the case were such as to cause him to exercise his discretion unfavourably to the application made by the appellant. The * 488 commissioner considered it proved that an act of * bankruptcy had been committed. The commissioner said there were cases of successful applications of this kind, although the interest of the creditor was adverse to that of the creditors at large; and that the case of *Ex parte Jones (a)* proved this, but that still there must be a grievance on the part of the creditor, — something of which he had a personal right to complain, — that there must be merits on his part, so that if his application were not acceded to, he would have a right to say he was aggrieved. This the commissioner thought could not be said in the present case. The commissioner considered that the application was intended to give the appellant the advantage of what the commissioner did not hesitate to pronounce a fraudulent act as regarded the creditors; namely, a secret conveyance, where the bankrupt was permitted to remain apparently the owner after his ownership had terminated. Upon this account he refused to annul the bankruptcy, and directed the costs to be paid by the appellant.

Mr. Swanston and *Mr. Daniel* appeared in support of the appeal.

Mr. Glasse and *Mr. Hardy*, for the petitioning creditor, took a preliminary objection that, according to *Ex parte Carter, (b)* this was an appeal from the adjudication, and that the twenty-one days for appeal ought to be reckoned from the day on which the adjudication was made.

It was arranged that the whole case should be argued together, and on the petitioning creditor's counsel being called on to show the existence of the legal requisites, they admitted that * 489 they were not then in a position to * establish them, and asked for the decision of the Court upon the preliminary objection and upon the discretionary grounds upon which the application had been refused by the commissioner.

In the course of the argument, —

(a) 3 Deac. & Ch. 697.

(b) *Ante*, p. 212.

The Lord Justice KNIGHT BRUCE said, he agreed that the statutory provision with regard to reputed ownership, so far as it went beyond the common law, had been probably productive of more injustice than justice, although in some instances it had no doubt done good.¹

The Lord Justice Lord CRANWORTH said that there appeared to have been nothing deceptive in the transaction in question as to the assignment. The creditor had left the debtor in possession, and had, when he thought the property in jeopardy, taken possession himself. It might be that he had done so too late, but the proceeding did not appear to be fraudulent.

Mr. Bacon and *Mr. T. H. Terrell*, for the assignees, did not oppose the appeal.

Mr. Swanston replied.

THE LORD JUSTICE KNIGHT BRUCE. — This petition for adjudication appears, so far as the evidence before us goes, to be unsupported by the legal requisites. That, however, is not decisive. Still, when a bankruptcy appears legally unsustainable, it lies upon those who attempt to support it here to show equitable grounds for it. There appear in this case to be no such grounds shown.

It is contended that the learned commissioner had * no * 490 jurisdiction to annul this adjudication, and that Mr. Bean's petition of appeal to this Court is in substance an appeal from the order of adjudication, and, so regarded, cannot be entertained, inasmuch as it was not presented till after an interval much beyond twenty-one days. We are of opinion that this is not a case of appeal from the order of adjudication, but that the appellant's original application to have the adjudication annulled was properly made to the commissioner under the general jurisdiction conferred upon him by the Act of Parliament, and that it was not until he had adjudicated upon that application of Mr. Bean that a case for appeal arose. So far as Mr. Bean is concerned, from the moment when Mr. Bean's application to the commissioner was rejected,

¹ *Ez parte Boulton*, 1 De G. & J. 163, 168.

and not before, it became a case for an appeal. He has appealed within twenty-one days after the decision. That is the way in which we view the case.

The Lord Justice Lord CRANWORTH concurred.

The adjudication was accordingly annulled.

In the Matter of JOHN WILLIAM COWLES BREWER,
a Bankrupt.

1852. March 28. Before the LORDS JUSTICES.

A creditor is not entitled to inspect the proceedings for the purpose of enabling him to impeach the validity of the adjudication.

THIS was a petition of appeal presented by a creditor against the refusal of the District Court of Bankruptcy for the Bristol District, to allow the petitioner to inspect the proceedings.

The decision was that of the registrar sitting for the commissioner, and the grounds of it appear from the following memorandum upon the proceedings:—

“Memorandum: That Mr. Wilkes, having this day applied to me for an order to permit him, as attorney for George Rimell, a creditor, who has proved his debt under the petition for adjudication of bankruptcy against the said bankrupt, to have inspection at all reasonable times, or at such times as the Court shall direct, of the affidavit of the petitioning creditor, the proofs of the act of bankruptcy and the other proofs filed in court on which the adjudication was made; and Mr. Abbot, solicitor to the assignees of the said bankrupt, having requested Mr. Wilkes to state what was the object of the application, and I having required him so to do, and having referred him to a memorandum of a similar application on behalf of a different creditor made to Mr. Commissioner Hill, at his sitting on the 10th day of February instant, and to which

application the said commissioner then refused to accede; and Mr. Wilkes, having stated that his object * was to * 492 impeach the adjudication by questioning the petitioning creditor's debt, and the act of bankruptcy; and Mr. Abbot, having stated his objections to the allowing of an inspection of the proceedings for that purpose, and it appearing to me that the application now made by Mr. Wilkes is precisely the same in effect as that which he made as aforesaid to Mr. Commissioner Hill, and that it is not a reasonable request, I dismiss the application, reserving the question of costs until the result of any appeal against the decision shall be ascertained."

The application, referred to in the memorandum, was made on the 10th February, 1852, to the commissioner, by the same attorney on behalf of another creditor of the bankrupt, on which the commissioner made the following memorandum:—"Mr. Wilkes, as solicitor to Mr. John Smith, a creditor, who has proved his debt under the above-mentioned petition, having applied for leave to inspect the affidavit of the petitioning creditor and the proofs of the acts of bankruptcy on which the adjudication was made, and having stated that his object was to impeach the petition by questioning the petitioning creditor's debt, and Mr. Abbot, as solicitor to the assignees, having objected to allow such inspection, I declined to accede to Mr. Wilkes's application."

The petition prayed that the order might be reversed, and that it might be ordered that the petitioner's attorney should be permitted to have inspection of the affidavit and other proofs filed in the Court at all reasonable times, or at such times as the Court should direct.

Mr. W. M. James, in support of the appeal.—* Under * 493 the 232d section (a) the appellant is entitled to the inspection which he requires.

(a) 12 & 13 Vict. c. 106, § 232. "That the proper officer of the Court in London, and in the several districts in the country, shall, on the reasonable request of any bankrupt or arranging debtor, or of any creditor, of such bankrupt, having proved his debt, or of any arranging debtor, when the debt of the arranging creditor has been admitted in the petition or proved, or on the like request of the attorney of any such bankrupt, debtor, or creditor, produce and show to such bankrupt, debtor, creditor, or attorney, at such times as the Court shall direct, every *fiat*, petition for adjudication of bankruptcy, adjudication of

[The Lord Justice KNIGHT BRUCE referred to the words "reasonable request," and inquired whether it was a reasonable request which sought inspection of the proceedings for the purpose of impeaching their validity?]

Those words only refer to the first part of the section. In proceedings in chancery a defendant must produce for his adversary's inspection every document not protected by some privilege.

THE LORD JUSTICE LORD CRANWORTH. — Does not the expression "such creditor" mean a creditor who has made a reasonable request?]

* 494 * This is a reasonable request; the creditor wishes to know the grounds on which a judicial proceeding has been taken, in order that he may judge whether to submit to it or resist it. Before he is required to come in under a bankruptcy, he ought to have the means of judging of its validity.

Mr. Bacon, for the respondents, was not called upon.

THE LORD JUSTICE LORD CRANWORTH. — I think the whole sentence must be read together; and the question is, whether this is a reasonable request. I cannot say that I think it is.

THE LORD JUSTICE KNIGHT BRUCE. — I am not perfectly satisfied that the particular documents which the appellant wishes to see are within the section, but I had rather not give any opinion upon bankruptcy, and petition for arrangement against or by such bankrupt,* and all orders and proceedings under any such *fiat*, petition, or adjudication, and the Court shall order the official assignee, or officer of the Court, as the case may be, to permit such bankrupt, debtor, creditor, or attorney to have inspection, at all reasonable times, of all books, papers, and writings relating to the matters of such *fiat*, petition, or adjudication, and the estate of the bankrupt or debtor in the possession of the assignees, or filed in Court in such matter, and permit him to inspect and examine the same; and such official assignee or such officer shall provide for any such bankrupt, debtor, creditor, or attorney requiring the same, an office copy of such *fiat*, petition, or other proceeding, books, papers, and writings as aforesaid, or of such part thereof as shall be required, receiving such fee or sum or rate of charge as may be authorized in that behalf."

* *Sic.*

that point. Assuming that they are within the section, a proper interpretation of its provisions requires the exercise of judicial discretion as to the reasonableness of the request. What is this application? The bankrupt's property has been converted into a fund for the benefit of his creditors, in which, therefore, the creditors at large are interested. One creditor has a wish adverse to the wishes of the general body, and desires to avail himself of the power given to the members of the general body to affect adversely the whole body of which he is one; his object being to take away and destroy the adjudication, and so take away from his fellows the benefit of the proceedings, he coming in under the guise of being one of them. I think that the application was unreasonable, and that the appeal must be dismissed with costs.

* BLINKINSOPP v. BLINKINSOPP.¹

* 495

1852. February 17, 18. Before the LORDS JUSTICES.

In 1842, a husband, pending proceedings against him in the Ecclesiastical Court for divorce, executed a voluntary settlement of real and personal estate, with the intent of defeating any process in the nature of execution. Sequestration afterwards issued against him under an Act of Parliament not in existence when the settlement was made.² On a bill filed by the wife, held that she was entitled to have the deed set aside, and to have an account of the receipts of the trustees from the time of the institution of the suit.

When the Appellate Court agrees with the main relief granted by the Court below, it requires a very strong case to induce it to depart from the decision as to costs.

THIS was an appeal from the decision of the late Master of the Rolls, reported in the 12th volume of Mr. Beavan's Reports, p. 568.

The suit was instituted by a wife, who had commenced proceedings against her husband in an Ecclesiastical Court for divorce, by reason of cruelty and adultery; and the prayer was for a declaration that a conveyance executed by the husband might be declared fraudulent and void as against the plaintiff, and might be delivered

¹ S. C., 12 Beav. 568, 583; 14 Jur. 777; 16 Jur. 787.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1055.

up to be cancelled, and that the plaintiff might have the full benefit of the proceedings in the Ecclesiastical suit against the property comprised in the indenture.

The proceedings in the Ecclesiastical Court were instituted in 1841, and in July, 1842, the husband was condemned in costs upon an interlocutory proceeding in the suit. The conveyance sought to be impeached comprised real and personal estate, and was executed in September, 1842.

On the 22d of April, 1843, 160*l.* per annum during the suit was allotted to the plaintiff for alimony.

On the 15th of December, 1843, the cause was heard before the Judicial Committee of the Privy Council, who reported in favour of the divorce, and of giving alimony and costs. The report * 496 was confirmed, and on November * 8, 1844, process was served to enforce payment. In December, 1844, a sequestration issued.

On the 1st of January, 1846, the bill was filed. The Master of the Rolls declared the deed void as against the plaintiff, and that the trustees of it ought to be deemed trustees (subject to certain debts which were held to have been well charged by the deed) for the plaintiff, so far as might be necessary to secure the payment of the moneys due to her under the orders made by the Ecclesiastical Court, and his Honor directed an account of the receipts and payments of the trustees from the day of the institution of the suit in Chancery.

The husband appealed from this decree.

Mr. Bethell, *Mr. Glasse*, and *Mr. J. V. Prior*, for the plaintiff, were stopped by the Court.

Mr. Dickinson, in support of the appeal. — In the first place, the decree is clearly wrong as regards the direction to take an account of the receipts of the trustees *pendente lite*. *Higgins v. York Buildings Company. (a)*

[Their Lordships sent for the registrar's book containing entries of the case referred to. (b)]

(a) 2 Atk. 107.

(b) There are two entries of the case in the year 1740, under the name of *Huggins v. York Buildings Company*. One is of the hearing, which is reported in *Atkins*, and which was on a petition and cross petition, both seeking to vary

* In the next place, the deed could not have been executed * 497
to withdraw the husband's property from the * operation of * 498

the minutes of a decree pronounced on October 24, 1740. The other entry is of that decree itself, as finally settled upon the hearing of the two petitions, to vary the minutes of it. The following are the material parts of these entries:—

“HUGGINS v. YORK BUILDINGS COMPANY.

“Reg. L. 1740, A. fol. 86, December 20, 1740.

“WHEREAS the said defendants, on the 15th of November, preferred their petition, and setting forth,” [&c. The statements of this petition, as recited in the order, were to the effect that the minutes of the decree, as delivered out by the registrar, directed an account from the time of pronouncing the decree. The petition as recited then stated as follows:—]

“That, in taking the minutes of the said decree, the registrar had by mistake (as the defendants apprehended) expressed it, that the Master should take an account of the profits of the waterworks that should, from the time of pronouncing the decree, be received, which would, as the defendants were advised, extend to all antecedent arrears, many of which were due before the plaintiffs had brought their bill, or the plaintiff Blackwell obtained the judgment, and that the arrears due at or before Michaelmas last were the only fund that the said defendants have to pay a considerable debt due to many persons for hay, corn, and other things used about the said waterworks before Michaelmas last, and the defendants apprehended that his Lordship directed the said Master to take an account only of the profits from the time of pronouncing the decree, that should be received: and, as the said rents of the said waterworks were payable quarterly, the said defendants were desirous (to avoid fractions in the account) that the same might extend to all rents and profits that should grow due subsequent to Michaelmas last, if his Lordship should think fit to order the same. Therefore it was prayed, that the said minutes might be rectified, and directions might be given. And whereas the said plaintiff Elizabeth Blackwell, on the 28th of November, preferred her petition [&c.], and praying that the said minutes might be rectified, and that directions might be given that the plaintiff Elizabeth Blackwell, and the other joint creditors who should come in according to the said decree, might be paid according to the priority of their registering their said judgments, out of the rents and profits of the said waterworks and other houses and waterworks in York Buildings, from the 28th day of May, 1734, that have been, or should be received by the defendants [&c.]. His Lordship doth order that the said plaintiff Elizabeth Blackwell's petition be dismissed; and on the defendants' the company's petition doth order that the minutes be rectified, that the Master do take an account of the rents and profits,” &c.

[The remainder of the entry is the same as the last sentence of the entry next set out.]

“Reg. L. 1740, A. fol. 130, October 24, 1740.

“And as to the demands of the said Elizabeth Blackwell, the representative of the said John Blackwell, the plaintiff, by bill of revivor, his Lordship declared

the writ which has issued, for at the time of the execution *499 of the deed there was no such *remedy in existence. It was first given by the 7 & 8 Vict. c. 69, which is the Act under which the sequestration has issued. Nor was there in fact, at the execution of the deed, any process against the property which the deed could have been intended to defeat.

Thirdly, the plaintiff cannot support the bill upon the ground of removing obstacles out of the way of the process of the Ecclesiastical Court, for a similar argument applies to this as to the former

that the deed of trust of the 28th day of May, 1734, for securing the repayment of what had been paid by any members of the company on the calls of 1*l.* 10*s.* and 1*l.* per cent on any estate or interest vested in the said Goddard and Wiseman, ought not in equity to stand in the way of judgment creditors, and doth therefore order and decree that the said Master do take an account of what is due to the said Elizabeth Blackwell for principal and interest and costs on the said judgment, and do tax her and the said John Blackwell's costs in this Court relating thereto, and that all the other judgment creditors of the said complainant be at liberty to come before the said Master, and prove their respective debts, and that the said master do also take an account of what is due to them respectively for principal, interest, and costs on their judgments; and to that end the said Master is to cause an advertisement to be published in the Gazette, and appoint a peremptory day for that purpose, and such of them as shall not come in within the time are to be excluded the benefit of this decree, and such as shall so come in before they are to be permitted to prove their respective debts, are respectively to pay and contribute to the plaintiffs a proportion of the costs of this suit, to be settled by the said Master, and the defendants, Goddard and Wiseman, desiring to be discharged of their trust, it is ordered that they do assign and convey the premises vested in them to new trustees, to be approved of by the said Master, and that the defendants, the complainants, and all proper persons do join in such assignment and conveyances as the said Master shall direct. And the said Master is likewise to take an account of the rents and profits of the said waterhouses, waterworks, and other houses in York Buildings, that have, or shall accrue from Michaelmas last, and shall be received by the defendants, the complainant, or the defendants Goddard and Wiseman, or such new trustees, or any of them, or by any other person or persons, for their or any of their use, or by their or any of their order; and what shall be so received is to be paid and applied, in the first place, in satisfaction of what shall be found due to the said plaintiff, Elizabeth Blackwell, and the several other judgment creditors, *pari passu*, in proportion to their respective debts till the whole shall be satisfied; and if any default shall be made in applying the rents and profits of the said waterhouses, waterworks, and other houses in York Buildings, according to the directions aforesaid, the plaintiff, Elizabeth Blackwell, and the other judgment creditors who shall so come in, are to be at liberty to apply to this Court to appoint a receiver of the rents and profits of the said waterhouses, waterworks, and other houses in York Buildings."

part of the discussion, that when the bill was filed there was no process in the way of which the deed stood. And there is, moreover, the objection that the plaintiff must have availed herself to the utmost of her remedies, independently of this Court, before applying to it for relief. *Neate v. Duke of Marlborough.* (a)

The remainder of the arguments were in substance the same as those addressed to the Court below, which are fully stated in the report of the case already referred to.

Mr. Willcock, Mr. W. R. Ellis, and Mr. Robson appeared for other parties.

THE LORD JUSTICE KNIGHT BRUCE. — We are of opinion that the alleged fraud against the plaintiff is clearly established, and that she is entitled to be relieved against it. The deed appears to have been executed pending a suit in the Ecclesiastical Court against the defendant who executed it, which suit, according to the law as it then stood, might, if successful, have ended in some kind of execution against his property. * We consider it to be * 500 demonstrated by the evidence that the deed was executed with the fraudulent intention of preventing the suit, if successful, from affecting that property.

We think that it makes no difference, that by a subsequent improvement or alteration in the law, a better and more effectual or a different mode of affecting the property by way of execution has been created, or that the plaintiff has resorted to it rather than to the mode which was alone in force when the deed was executed. We are of opinion that this is of no manner of importance.

She had issued execution before filing the bill, and therefore it is not necessary to consider whether, to the success of a suit of this kind, it is necessary that execution should issue before the filing of the bill.

It has, however, been suggested that she might have obtained relief in some other Court or in some other mode. If that be so, still, according to the law of the country, she is entitled to ask a Court of Equity to deliver her from a deed fraudulently obtained for the purpose of interfering with her just rights, a character which as we think belongs to the deed here in question. The only

(a) 3 M. & C. 407.

point on which we are not satisfied is, whether the decree does not go beyond the limits of a decree in such a suit. We think the decree right in setting aside, so far as it did set aside, the deed, and in giving costs. It is said that less costs ought to have been given; but if the Court of Appeal agrees with the main relief given by the Court appealed from, it requires a strong case to render it right for the Court of Appeal to depart from the adjudication as to costs. No such strong ground has been here shown. The only question therefore is, whether the decree has gone beyond the proper limits of a decree in such a suit.

* 501 * *Mr. Bethell*, in reply. — The execution ought to be effectual against the property which will be from time to time in this Court in the hands of the receiver. Otherwise there would have to be a supplemented bill every half-year. The relief granted in tithe suits affords an analogy.

THE LORD JUSTICE KNIGHT BRUCE. — Let the appeal be dismissed with costs, without prejudice to the question what ought to be done in the event of payment of all arrears of alimony up to the date of the report, and of all costs of the suit up to the date of the report, and such other costs (if any) as the plaintiff is or may be entitled to in that event, and with liberty to apply.

WELLESLEY v. WELLESLEY.

COUNTESS OF MORNINGTON v. EARL OF MORNINGTON AND OTHERS.

1852. February 27. Before the LORDS JUSTICES.

A married woman filed a bill, suing *in forma pauperis*, under an order of the Court, without a next friend, and obtained a decree. On an unsuccessful appeal, the appellant was ordered to pay to the plaintiff herself *divers costs*.¹

THIS was an appeal from a decision of the Vice-Chancellor of England, reported in the 17th volume of Mr. Simons's Reports, p. 59.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 39, 43, 111; 2 *ib.* 1482, 1483.

The suit was instituted by the Countess of Mornington, who sued *in formâ pauperis* under an order of the Court, (a) without a next friend.

Her husband was one of the defendants; his eldest son was another of the defendants, and appealed from the decree.

Mr. Bethell, Mr. Lloyd, and Mr. Nalder supported the appeal.

* *Mr. Rolt, Mr. Willcock, and Mr. Freeling* appeared for * 502 the Countess of Mornington.

THEIR LORDSHIPS dismissed the appeal.

On the question of costs *Rubery v. Morris* (b) was referred to.

The Lord Justice KNIGHT BRUCE said that the costs ought, according to the authorities, to be *dives* costs; but that there appeared to be a difficulty as to the person to whom they were to be made payable, there being no next friend.

Ultimately the order was made for payment to the plaintiff of *dives* costs in the usual way, their Lordships observing that probably the effect of the order would be that they would be received by the plaintiff's solicitor, and that, if any difficulty should occur, application might be made to the Court.

GUNDRY v. PINNIGER.

1852. March 4, 5. Before the LORDS JUSTICES.

A legacy was bequeathed in trust for a grandniece for life; and, in case she died without children, for her brother, if he should be then living, but if he should be then dead, then unto his next of kin in a legal course of distribution *ex parte maternâ*. The grandnephew died in his sister's lifetime. *Held*, that she took as his next of kin.¹

(a) 16 Sim. 1.

(b) 1 Mac. & G. 413.

¹ See 1 Jarman Wills (3d Eng. ed.), 71, 96, 115; *Baldwin v. Rogers*, 3 De G., M. & G. 649.

THIS was an appeal from the decision of the Master of the Rolls, reported in the 14th volume of Mr. Beavan's Reports, p. 94. The question was as to the construction of a codicil whereby the testatrix gave a fund to her grandniece, Mary Lucy Tuckey, for her life, and in case she died without children (which happened), or they should all die before their shares became payable, then upon trust after her decease to pay or assign and transfer the fund unto her brother, the testatrix's grandnephew, Nicholas * 503 T. S. Ponting, if he should be then * living, but if he should be then dead, then unto his next of kin in a legal course of distribution *ex parte maternâ*. The testatrix died in 1813, Nicholas T. S. Ponting in 1836, M. L. Tuckey died in 1849, without having had a child. The questions were at what period the next of kin *ex parte maternâ* of N. T. S. Ponting were to be ascertained, and of whom they consisted. The Master of the Rolls held that Mrs. Tuckey, who was the next of kin of N. T. S. Ponting living at his death, became thereupon entitled, and that the circumstance of her being the next of kin *ex parte paternâ* as well as *ex parte maternâ* did not exclude her. Against this decree some defendants who were the next of kin *ex parte maternâ* (if Mrs. Tuckey was excluded) appealed.

Mr. Hobhouse was for the plaintiffs, the trustees.

Sir. W. P. Wood and *Mr. J. V. Prior*, for the appellants. — It may be conceded that *primâ facie* under a bequest to the next of kin of any person, his next of kin living at his death will be entitled. That construction, however, may be excluded by the circumstances of the case. Now here the circumstances of the next of kin of the legatee in remainder being the tenant for life, and of her being the next of kin *ex parte paternâ*, show that such a construction would not give effect to the intention, and would reduce to silence the words *ex parte maternâ*: *Beck v. Burn*, (a) *Jones v. Colbeck*, (b) *Miller v. Eaton*, (c) *Minter v. Wraith*, (d) *Booth v. Vicars*, (e) *Say v. Creed*, (g) *Clapton v. Bulmer*, (h)

(a) 7 Beav. 492.

(b) 8 Ves. 38.

(c) G. Coop. 272.

(d) 13 Sim. 52.

(e) 1 Coll. 6.

(g) 5 Hare, 580.

(h) 5 M. & C. 108.

*Gould v. * Kemp.* (a) Moreover the use of the word "then," * 504 and of the word "distribution," makes this a stronger case than *Clapton v. Bulmer* for departing from the mere literal construction.

Mr. Bethell and *Mr. Lloyd*, for the personal representative of *Mrs. Tuckey*.—Stronger grounds for conjectural departure from the legal import of the words of a bequest have been held insufficient for that purpose. *Urquhart v. Urquhart*, (b) *Ware v. Rowland*, (c) *Bird v. Wood*, (d) *Leeming v. Sherratt*, (e) *Smith v. Palmer*. (g)

[The Lord Justice KNIGHT BRUCE referred to the words of *Mr. Justice BURTON* in *Warburton v. Loveland*, (h) as cited by Baron PARKE in *Toldervy v. Colt*. (i)]

In *Bird v. Luckie*, (k) which is strongly in our favour, all the authorities are commented upon, and from what fell from one of your Lordships in that case it appears that in *Booth v. Vicars* (l) it was not intended to depart from the general principle on which we rely.

[THE LORD JUSTICE KNIGHT BRUCE.—*Mr. Bedwell* has brought us the Master's report in *Booth v. Vicars*, (l) from which it appears that the period of ascertaining the class in that case was not very material. The important question was as to the construction otherwise of the words "nearest personal representatives."]

Mr. J. V. Prior replied.

* THE LORD JUSTICE LORD CRANWORTH.—We think (one * 505 of us with more doubt than the other) that the Master of the Rolls has come to the proper conclusion as to the construction of this codicil. It is, as pointed out by Vice-Chancellor Wig-

(a) 2 M. & K. 304.

(e) 2 Hare, 14.

(b) 13 Sim. 613.

(g) 7 Hare, 225.

(c) 15 Sim. 587.

(h) 1 Huds. & Brooke, 648.

(d) 2 Sim. & St. 400.

(i) 1 M. & W. 264; 1 Y. & C. Exch. 621.

(k) 8 Hare, 301.

(l) 1 Coll. 6.

RAM in *Smith v. Palmer*, and also by my learned brother in *Bird v. Luckie*, exceedingly difficult, perhaps impossible, to reconcile all the cases on the subject. The view which I take of the case is this, that whatever difficulty there may be in reconciling the cases on questions of this sort, or cases on analogous subjects, the great cardinal rule is that which is pointed out by Mr. Justice BURTON; viz., to adhere as closely as possible to the literal meaning of the words. When once you depart from that canon of construction, you are launched into a sea of difficulties which it is difficult to fathom. Now is there any thing on the face of this codicil making it inconsistent with the adoption of the ordinary meaning of the words, or leading to a manifest absurdity if that meaning be adopted? I see nothing of the sort. In the course of the argument I speculated on a variety of contingencies, which might be supposed to happen, and upon which, if you could ask the testatrix in her grave what she meant should take place under the circumstances, her answer would probably be that she did not contemplate them, but might well say that if she had, what she wished was that which the literal meaning of the words conveyed. Suppose that Ponting had died leaving two children, and that one of them had died afterwards leaving two children, and the other had died leaving one child, and then the sister of Ponting had died. If the word next of kin is to have its ordinary meaning of next of kin at the death of the person mentioned, then one of the grandchildren would take one half, and the other two a quarter each. If it meant next of kin at the death of his sister, the grandchildren would share equally. But probably this actual

* 506 state of * things was not thought of by the testatrix, and it is impossible to speculate what would have been her desire if it had been. My conclusion (founded on the rule of Mr. Justice BURTON) is, that the meaning of the "next of kin," is next of kin at the death of the person whose next of kin is spoken of. I see nothing on the face of this will rendering the adoption of that construction incorrect or absurd; and my conclusion is, that that is the proper construction to adopt in this case.

WHICKER v. HUME.¹

1852. March 5, 6. Before the LORDS JUSTICES.

A testator devised and bequeathed residuary estate, consisting partly of real estates in New South Wales, to trustees upon trust to apply the same at their absolute and uncontrollable discretion, for the benefit and advancement and propagation of education and learning in any part of the world, so far as circumstances would permit. *Held*, a valid charitable bequest.²

THIS was an appeal from the decision of the Master of the Rolls upon the effect of the will of Dr. Borthwick Gilchrist, dated the 8th of December, 1840, whereby the testator gave and bequeathed all his residuary, real, and personal estate to trustees upon trust for sale, and to invest the residue of the produce after payment of the expense of sale in the parliamentary stocks or public funds, stocks, and securities of the colonies, or of any foreign stock, or on mortgage of lands in Scotland or Ireland, or in the colonies, or with stock of any commercial company, but so that no investment should be made which could not by law be disposed of by will to a charity. The testator then directed the trustees to stand possessed of such stocks and securities and moneys upon trust to pay certain annuities, and as to the residue upon such trusts as he should declare by his codicil. On the day of the date of the will the testator made a codicil in the following terms:—

“This is a codicil to the last will and testament of me, John Borthwick Gilchrist, which will bear even date with, but was executed previously to, this codicil. I hereby direct and appoint that the trustees or trustee *for the time being of * 507 my said will do and shall stand possessed of and interested in the residue or surplus of the trust moneys and securities thereby to them bequeathed, in trust to appropriate the same in such manner as they, my said trustees or trustee, shall, in their absolute and uncontrolled discretion, think proper and expedient, for the

¹ S. C. 14 Beav. 509; 7 H. L. Cas. 124.

² See 1 Jarman Wills (3d Eng. ed.), 192, 193; *Franklin v. Armfield*, 2 Sneed, 305; *Cresson's App.* 30 Penn. St. 437; *Vidal v. Girard*, 2 How. (U. S.) 127; *Saltonstall v. Sanders*, 11 Allen, 446; *Price v. Maxwell*, 28 Penn. St. 35; 2 Story Eq. Jur. § 1164; *Jackson v. Phillips*, 14 Gray, 539, 566; *President of the United States v. Drummond*, cited in *Whicker v. Hume*, 7 H. L. Cas. 124.

benefit and advancement and propagation of education and learning in every part of the world as far as circumstances will permit."

At the time of the testator's death he was entitled to personal estate and a leasehold house in Scotland, and real estate in South Wales.

The Master of the Rolls held that the bequest contained in the codicil was valid. Against this decision the next of kin appealed.

Mr. Bethell, Mr. Rolt, and Mr. Springall Thompson, in support of the appeal. — The words "for the advancement and propagation of education and learning," are too vague for this Court to give effect to. And as they do not denote exclusively charitable objects the gift fails. *Brown v. Yeall*, (a) *Morrice v. The Bishop of Durham*, (b) *James v. Allen*, (c) *Ommaney v. Butcher*, (d) *Williams v. Kershaw*, (e) *Ellis v. Selby*, (g) *Kendall v. Granger*. (h)

[THE LORD JUSTICE KNIGHT BRUCE. — If in *Williams v. Kershaw* the word "benevolent" had alone been used, it would have been ineffectual. There it seems to have been held that the use of that adjective with others of more definite import which it followed deprived the other of effect.]

* 508 * [THE LORD JUSTICE LORD CRANWORTH. — The House of Lords seems to have read the bequest as meaning for benevolent purposes, for charitable purposes, and for religious purposes.]

In the present will the objects are altogether indefinite, and extend to the whole habitable globe; a gift for the advancement of learning might be properly applied by offering rewards for discoveries of any kind. In *Nightingale v. Goulburn*, (i) the benefit was confined to the inhabitants of Great Britain. In the next place, supposing the bequest could be deemed to be charitable, it is void as regards the proceeds of the freehold in New South Wales, under the 9 Geo. 2, c. 36. By the 9 Geo. 4, c. 83, (k) that law is

(a) 7 Ves. 50 n.

(b) 9 Ves. 408; 10 Ves. 532.

(c) 3 Mer. 17.

(d) Turn. 260.

(k) Sect. 11. "The said Supreme Courts respectively shall be Courts of Equity in New South Wales and Van Diemen's Land, and the dependencies

(e) 1 Keen, 232 n; 5 Cl. & Fin. 111.

(g) 7 Sim. 352.

(h) 5 Beav. 300.

(i) 5 Hare, 484.

extended to * the colonies. *Attorney-General v. Stewart*, (a) * 509 may be cited on the other side, but the colony there was Grenada, where the French law prevails. The Act 9 Geo. 4, c. 83, provides that the laws of England shall prevail so far as can be applied. Now the principles of the Act are generally applicable. The mischief against which it is intended to guard is to be found everywhere.

[THE LORD JUSTICE KNIGHT BRUCE. — How could the provisions as to enrolment be carried into effect in New South Wales? According to the construction contended for, may not any quantity of land in New South Wales be given to Oxford, Cambridge, Eton, Winchester, or Westminster, while a single acre cannot be given for the benefit of similar institutions in the colony?]

The 24th section of the Act enables the governor of the colony for the time being to make such limitations and modifications of the English law as may be deemed expedient.

thereof respectively, and shall have power and authority to administer justice, and to do, exercise, and perform all such acts, matters, and things necessary for the due execution of such equitable jurisdiction, as the Lord High Chancellor of Great Britain can or lawfully may within the realm of England, and all such acts, matters, and things as can or may be done by the said Lord Chancellor within the realm of England, in the exercise of the common-law jurisdiction to him belonging."

Sect. 24. "All laws and statutes in force within the realm of England at the time of the passing of this Act (not being inconsistent herewith, or with any charter or letters-patent or order in council, which may be issued in pursuance hereof) shall be applied in the administration of justice in the Courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said colonies; and as often as any doubt shall arise as to the application of any such laws or statutes in the said colonies respectively, it shall be lawful for the governors of the said colonies respectively, by and with the advice of the legislative councils of the said colonies respectively, by ordinances to be by them for that purpose made, to declare whether such laws or statutes shall be deemed to extend to such colonies, and to be in force within the same, or to make and establish such limitations and modifications of any such laws and statutes within the said colonies respectively as may be deemed expedient in that behalf: provided always, that, in the mean time and before any such ordinance shall be actually made, it shall be the duty of the said Supreme Courts, as often any doubts shall arise, upon the trial of any information or action, or upon any other proceeding before them, to adjudge and decide as to the application of any such laws or statutes in the said colonies respectively."

(a) 2 Mer. 141.

[THE LORD JUSTICE KNIGHT BRUCE.—Is not the question one for the decision of a Court in the colony?]

In the Mortmain Act, land in Scotland is excepted, and
 * 510 if it had been the intention of that statute to exclude *lands in the colonies from its operation, a similar exception would have been introduced. They also referred to *Lyon v. Colville* (a) *Loacombe v. Wintringham*, (b) Hargrave Coll. Jur. 162.

Mr. Roundell Palmer, Mr. Anderson, Mr. Bagshawe, Mr. W. M. James, Mr. Beavan, and Mr. W. Morris, for the respondents, were not called on.

THE LORD JUSTICE KNIGHT BRUCE.—The appeal in this case raises three questions, the first of which is involved in the two others, and need not be considered separately. The second question is, whether independently of the Statute of 9 Geo. 2, c. 36, whether on the assumption that the gift does not affect property obnoxious to that statute, there is a good trust for what this Court considers to be charitable purposes created by these words: "I hereby direct and appoint that the trustees or trustee for the time being of my said will do and shall stand possessed of and interested in the residue or surplus of the trust moneys and securities to them bequeathed, in trust to appropriate the same in such manner as they, my said trustees or trustee, shall, in their absolute and uncontrolled discretion, think proper and expedient for the benefit, and advancement, and propagation of education and learning in every part of the world, as far as circumstances will admit." I apprehend that the only difficulty as to this part of the case is created by the introduction of the two words "and learning" after the word "education." That a trust for education would be good, notwithstanding what this testator has said, whether effectually or ineffectually, of the uncontrolled discretion of the trustees, is clear of doubt. The arguments against its validity have been
 * 511 directed to the word "learning." * Now my impression of the true construction is that either the words "and learning" add nothing whatever to the idea represented by the term "education," or, if they do, that the phrase "learning" is only to be con-

(a) 1 Coll. 449.

(b) 13 Beav. 87.

sidered as explanatory of the word "education;" and that it is the same as if the testator had said "education in learning," as distinguished from education in other subjects or matters, to which the term education might have been applied. I think that the introduction of the expression does not render bad and ineffectual that which would have been good and effectual without it.

The next question is as to the property comprised in the bequest, and it has been suggested that immovable property in New South Wales must be ineffectually given to charitable purposes, as it is said to fall within the provisions of 9 Geo. 2, c. 36, by reason that the 24th section of 9 Geo. 4, c. 83, provides that all laws and statutes in force within the realm of England, at the time of the passing of the Act, not being inconsistent therewith, or with any charter or letters-patent, or order in council, which might be issued in pursuance thereof, should be applied in the administration of justice in the Courts of New South Wales and Van Diemen's Land respectively, so far as the same could be applied within the said colonies. Taking the whole of the section together, I am of opinion that the words "can be applied" mean "can be reasonably applied," a construction which, of necessity, introduces all those considerations that presented themselves to Sir WILLIAM GRANT'S mind in the case of *Attorney-General v. Stewart*, (a) a case specifically differing from the present, but which it is impossible to read without seeing that *the opinion expressed by Sir * 512 WILLIAM GRANT applies to a case like this. He there suggests various reasons against the application of such a statute as that of 9 Geo. 2, c. 36, to a colony, unless the legislature had thought fit expressly so to apply it. Here, in the first place, it is to my mind doubtful, or more than doubtful, whether there could be an enrolment such as the statute requires. It is true that jurisdiction is conferred upon the Supreme Court analogous to the equitable and common-law jurisdiction exercised by the Court of Chancery here; but with regard to the particular enrolment which the statute requires, how could enrolment in the Courts in the colonies satisfy the words of the Act of Geo. 2? In the next place, there are the peculiar privileges granted to certain places of education in this country, in which the inhabitants of a colony cannot be expected to feel as much interest as ourselves.

(a) 2 Mer. 166.

For these particular reasons, for the reasons given by Sir W. GRANT, and for general reasons connected with the 9 Geo. 4, c. 83, I am of opinion that it ought to be held that the Statute of 9 Geo. 2, c. 36, is inapplicable to the colony in question, within the sense and meaning of the Act of 9 Geo. 4.¹ There can be no objection to that declaration being made here, but whether it will be binding upon the Colonial Court is a different question. We have jurisdiction here over the person, and may declare the law according to the best interpretation that we can put upon it. The appeal must be dismissed, and the costs of all parties must be paid out of the fund.

The Lord Justice Lord CRANWORTH concurred.

* 513 *In the Matter of the WOLVERHAMPTON, CHESTER,
AND BIRKENHEAD RAILWAY COMPANY;

AND

In the Matter of the JOINT-STOCK COMPANIES WINDING-
UP ACTS, 1848 and 1849.

DALE'S CASE.

1852. January 31 and March 8. Before the LORDS JUSTICES.

Where the Master has made an estimate, so far as is practicable, of the total amount for which, under the Winding-up Acts, the contributories are liable, he may properly make a call for that amount, and the costs of winding up, although the costs have not been taxed, and the exact amount of liabilities are not ascertained, and may make the call for such sum as he may consider likely to realize the sum required.*

THIS was an appeal from the decision of Vice-Chancellor KINDERSLEY, refusing a motion made on the part of the appellant to discharge an order made upon him by the Master for a call in the course of winding up the affairs of the above company.

The company had been provisionally registered, but no deed of settlement had been executed.

The Master (*Mr. Brougham*) made a report on the 30th of July,

¹ See 1 Jarman Wills (3d Eng. ed.), 221; Attorney-General v. Giles, 5 L. T. N. S. Ch. 44; Mayor of Lyons v. East Ind. Co., 1 Moo. P. C. C. 298.

* See *Ex parte Woolmer*, 2 De G., M. & G. 665.

1851, to the following effect: "I have proceeded with the said reference, and have settled on the list of contributories the following persons as contributories, being members of the provisional and managing committees, with their own consent, and having agreed to take one or more shares, upon such share or shares being allotted to them according to the provisions of the said company, and to each of whom twenty-five shares were allotted, that is to say."

The report set forth a list of forty names, including that of the appellant, and stated that, on the 12th of July, 1850, the Master had made a call on these persons * of 150*l.* each, * 514 which produced 858*l.* 14*s.* 9*d.*, which was expended in paying 79*l.* 16*s.*, a claim on the company; 188*l.* 14*s.* in paying Cottle's costs as directed by the House of Lords; 556*l.* 2*s.* 11*d.* in part payment of the expenses of winding up, leaving 34*l.* 1*s.* 10*d.* in the hands of the official manager. That from the books of the company it appeared that 11,243*l.* 2*s.* 5*d.* was incurred in debts and expenses, all of which had been discharged by contributories in unequal proportions, with the exception of 216*l.* 0*s.* 8*d.*, which still remained due.

It then proceeded thus:—

"And I find that there have been costs ordered by the Court to be paid by the official manager, and which are already taxed, amounting to the sum of 237*l.* 6*s.* 4*d.*, of which the sum of 188*l.* 14*s.* has been paid by the official manager as aforesaid, leaving 48*l.* 6*s.* 4*d.* still remaining unpaid; and that, in the winding up of the affairs of this company, the official manager has, by himself and his solicitor, expended large sums of money, and properly incurred costs, which, together with the costs so ordered to be paid, I estimate will amount to 1248*l.* 6*s.* 4*d.* and upwards; and the said official manager has proposed to me, that, for the purpose of paying outstanding liabilities, and adjusting the claims of the contributories, and for raising the sum of 1248*l.* 6*s.* 4*d.* for the costs of the winding up, a call should be made of 60*l.* on each of the said contributories, so settled on the list as aforesaid. And I am of opinion and find that the sum of 5227*l.* 3*s.*, being that part of the expenses incurred between the 1st of November, 1845, being the date of the consent to act as provisional committee men, and take one or more shares, signed by each of the said committee men as aforesaid, and the 1st of December, 1845, being the

* 515 day on which the said managing * committee decided on suspending all expenses, were expenses necessarily incurred in preparing to launch the common concern in which the said several contributories had engaged; and I find that each of the said several contributories so settled on the list as aforesaid, is legally liable to bear and pay his ratable proportion of the said necessary expenses of the committee in preparing to launch the common concern, and also to bear and pay his ratable proportion of the costs incurred in winding up this company; and I am of opinion it is necessary and proper to raise the said sum of 5227*l.* 3*s.*, being the amount of the expenses incurred as aforesaid between November 1st and December 1st, 1845, and also the said sum of 1248*l.* 6*s.* 4*d.* for the said costs, by means of a call of 60*l.* upon each of the several before-mentioned contributories, each of the several contributories who has already made any payment by way of contribution to the said expenses, or otherwise having credit given him for the amount so paid by him against such call; and I direct an order for the call of 60*l.* to issue against each of such several contributories upon whom notice of the intended call has been served, as appears by the affidavit of William Lowther, clerk of the official manager. Sworn before me on the 30th day of July instant."

On the same day (the 30th of July) the Master made a peremptory order for the call of 60*l.* on the appellant and the other contributories on the list, and ordered each contributory to pay to the official manager on the 28th of August then next, "the balance, if any, which will be due to him, after debiting his accounts in the company's books with such call."

The appellant then moved before Vice-Chancellor KINDERSLEY to discharge the order, but the Vice-Chancellor held that as * 516 the report on which the call was * founded was not questioned, he could not discharge the order.

Mr. Glasse and *Mr. Greene*, in support of the appeal. — The document on which the official manager relies as a report is really no report, but a mere memorandum of the Master. Sections 100 and 118 of the Winding-up Act 1848 show what a report is, and that the definition does not extend to such a memorandum as this. Nor will the 49th section of the Act of 1849 advance the matter further, for this is not a book of account as a document of the

company ; it is a mere financial statement from *ex parte* evidence. If it is a report, it must be made to some Court, but this is only a report of the Master to himself. Besides it was made on the same day with the call, and there was no time for calling it in question if it was necessary to do so.

Mr. Bethell and *Mr. Roxburgh* were for the official manager.

THE LORDS JUSTICES said that as the report had been made at the same time with the call, the appellant ought to have an opportunity of going before the Master, and of being heard upon it, and their Lordships ordered the appeal to stand over, with liberty for the appellant to apply to the Master as he should be advised, and that all proceedings under the order should be suspended till further order.

The appellant afterwards appeared before the Master, and was heard in opposition to the report. The Master, however, adhered to the finding contained in it.

Mr. Glasse and *Mr. Greene* for the appellant. — The present is the only form of objecting to the * Master's * 517 finding, for we still submit that the memorandum upon the file of the proceedings is not a report to which we can except or object, otherwise than by moving to discharge the order founded upon it. There are no facts before the Master supporting the finding or the call. There is nothing to show any legal liability on the part of *Mr. Dale* to pay the demands or the costs for which the call is made. The costs are not even taxed, so that there is really no *constat* as to the amount of them or as to the sum that is really required.

They referred to *Upfill's Case* (a) and *Hunter's Case*. (b)

Mr. Bethell and *Mr. Roxburgh*, for the official manager. — Instead of coming to dispute the report, the appellant comes here to dispute the validity of that which is the legitimate consequence of it, and which cannot be disturbed so long as the report remains

(a) 1 Sim. N. S. 395.

(b) *Ibid.* 435.

unimpeached. All that the appellant now says is that he is not liable at law or in equity. The report disposes of that argument. With regard to the evidence that the amount is required to be raised, the Master has acted under the 83d section of the Act of 1848, and the 28th section of the Act of 1849, which enable the Master to make such a call as should appear to him to be probably sufficient to raise the amount of them, having regard, among other things, to the circumstance that any of the contributories might not be in a condition to pay.

Mr. Glasse, in reply.

* 518 *THE LORD JUSTICE LORD CRANWORTH. — We are both of opinion that the decision of the Master is right. The Master's order proceeds upon a report of even date with it, and no doubt some anomaly and difficulty might exist in dealing with that in point of form; because it is true, as has been argued, that if the appellant objects to the order as founded upon an error in fact, the proceeding which ought to have been questioned was the report and not the order for a call. And as the report in this case was concurrent with the order of the same date, and being, therefore, in all probability a document to which the parties affected by the order never had access, there is in point of form, or there might have been, some difficulty. But it would be a difficulty which this Court would not permit to stand in its way. If the appellant was damnified by an order, proceeding upon a report which he had no practical opportunity of questioning, the circumstance that he made his complaint to the form of the order itself, and complained of the order instead of the report, would be a matter which this Court certainly would not have regarded as permanently affecting his rights. We should, if necessary, have given him an opportunity of questioning the report, and of having a decision upon the merits of the case. Indeed, we thought we had done so, by giving him an opportunity of going before the Master to make any application he might be advised to make; and if he had any means of questioning the accuracy of that which the Master calls, and probably accurately calls his report, by showing that it was inaccurate, no doubt he would have done so. As the appellant has failed to do this, I think we are bound to assume that the report is substantially accurate as to the demands that are exist-

ing against this association or company, or by whatever name it is to be designated.

* Taking that to be so, what the Master finds in substance * 519 is this : that the contributories of this company consist now only of forty persons ; that every one of these forty persons is liable to the same amount, each having become liable, because they all, on the 1st of November, 1845, agreed, being members of the provisional committee, to take shares. Mr. Dale was one of these persons, and it has been said (though I do not go much on that) was a leading member of the committee. Expenses were incurred between that day and the 1st of December following, to the extent of 5000*l.* and upwards. The Master finds all that, and therefore, acting upon the principle laid down in the House of Lords in *Upfill's Case*, has proceeded to ascertain to what extent each of the contributories is liable, and having done so, has made a call to meet that liability. He has ascertained, that the amount to which all the contributories are liable, is something more than 5000*l.* They are liable also to the costs of winding up the concern, which is their concern exclusively. There is no other contributory, no other liability to be at all wound up. The Master, therefore, says, "As a call must be made to meet this 5000*l.*, together with the costs, I now will do, with regard to the costs, the best that the nature of the thing enables me to do. I cannot tell to a shilling what it will be, but I estimate and make the best account I can ; and having made out that account, I find that the whole amount is the sum of 5000*l.* together with another sum of 1200*l.* Therefore to the extent of that 5000*l.* and 1200*l.* the parties are to contribute." Almost all of it has been paid by means of another call, and, as I suppose, by payments before any call was made ; large sums have been paid on account, but in order to equalize all this and to do justice, the Master now, having previously made a call of 120*l.* makes a call which, in his judgment and * in the judgment of the official man- * 520 ager, will meet the case with practical accuracy ; namely, a further call of 60*l.*

I think that is all the Master can do, or ought to do. He has no possibility of arriving at a conclusion as to what absolutely to a farthing these persons will have to pay. The section which has been referred to, clearly shows that the Act did not mean to impose upon the Master a practical impossibility in point of

figures. Having ascertained all the *data* on which he is to proceed, and having ascertained that the parties before him are all equally liable to outstanding liabilities, so far as there are any outstanding, he proceeds to equalize the contributions among them, and to apportion their contribution to the costs, and makes a call for that which, on the best estimate which he can form, will raise the necessary sum.

That I think is all the Master could do; he seems to me not at all to have come in conflict with my decision in *Upfill's Case*, or with *Hunter's Case*, which does not touch the present. I think the Master was quite right in making such call, and therefore that the motion must be refused, with costs.

The Lord Justice KNIGHT BRUCE concurred.

* 521 * WEBB v. THE DIRECT LONDON AND PORTSMOUTH RAILWAY COMPANY.¹

1852. March 5, 6, and 22. Before the LORDS JUSTICES.

The promoters of a railway company, in consideration of a land-owner's opposition to the bill being withdrawn, agreed to pay him 4500*l.*, as the purchase-money of land, not exceeding eight acres, to be taken by the company for the formation of this railway and for consequential damage. The Act was obtained, and the agreement adopted by the company in consideration of the land-owner releasing the promoters from their covenant. The agreement was so framed as to render it doubtful whether it was not to be contingent on the formation of the railway. The railway was abandoned, and after the expiration of the time limited for the acquisition of land for the purposes of the undertaking by the company, the land-owner filed a claim for a specific performance of the agreement. *Held*, to be a case in which a decree would produce more injustice than justice; and a specific performance was therefore refused.²

¹ S. C. 10 Hare, Ap. 16; 9 Hare, 129.

² See Sugden V. & P. (14th Eng. ed.) 76; *Stuart v. The London and North-Western Railway Co.*, *post*, 721, 733; *Hawkes v. The Eastern Counties Railway Co.*, *post*, 737, 754 and cases in note, 760 and cases in note; *Ffooks v. South-Western Railway Co.*, 1 Sm. & Gif. 142; *Parkin v. Thorold*, 16 Beav. 59, 67; *The Shrewsbury and Birmingham Railway Co. v. The London and North-Western Railway Co., &c.*, 4 De G., M. & G., 115; *Inge v. The Birmingham*,

THIS was an appeal from the decision of the Vice-Chancellor TURNER, reported in the ninth volume of Mr. Hare's Reports, p. 129.

By an agreement dated 23d of July, 1845, and made between C. S. Crowley, B. Baines, and J. Laurie, three of the promoters of an Act of Parliament for making a railway from the Croydon and Epsom Railway at Epsom, to the town of Portsmouth, to be called "The Direct London and Portsmouth Railway Company," on behalf of themselves and all others the promoters of the said act, of the one part; and P. B. Webb, the appellant, of the other part; and it was agreed as follows: "First, that the company to be incorporated under the said Act of Parliament when passed, should at their own costs and charges build a bridge over the railway at a specified place, or at such other place as Mr. Webb should by writing direct; and that such bridge should be of the dimensions and description therein set forth. Secondly, that the company should deviate from their proposed line as delineated in the plan, so far to the eastward thereof as to avoid altogether any interference with a piece of meadow land, the property of Mr. Webb, or the plantation round the same. Thirdly, that the company should, if empowered so to do, purchase a * 522 piece of land, the property of the Dean and Chapter of Salisbury, containing by estimation one acre (more or less), which would lie between the said deviated line of railway on the one side, and a piece of meadow land and plantation numbered 152 and 153, and a piece of land in the said plan marked 35, on the other side; and immediately on such purchase being completed, should convey the same at their own costs and charges to Mr. Webb, his heirs or assigns, or as he or they should direct, for a nominal consideration. Fourthly, that the company should build an archway under their railway, between certain specified points.

There were other stipulations as to accommodation works. And the last clause was as follows:—

Wolverhampton, and Stour Valley Railway Co., 3 De G., M. & G. 658; Norwich v. The Norfolk Railway Co., 4 El. & Bl. 397; Bland v. Crowley, 6 Exch. 522; Gage v. Newmarket Railway Co., 18 Q. B. 457; Preston v. Liverpool, &c., Railway Co., 17 Beav. 114; 2 Macq. H. L. 420; Gooday v. Colchester, &c., Railway Co., *ib.* 132; London and Brighton Railway Co. v. London and South-Western Railway Co., 4 De G. & J. 389; Williams v. St. George's Har. Co., 2 De G. & J. 547.

“ Lastly, that the company shall pay to the said P. B. Webb the sum of 4500*l.*, together with his costs, charges, and expenses incurred up to the day of the date of the agreement, by reason of the intended formation of the said railway (not exceeding the sum of 150*l.*), before the company shall enter on any of the lands of the said P. B. Webb, for the purpose of making the said railway ; and that all timber and other trees on the lands to be taken by the said company, shall be the property of the said P. B. Webb. And it is hereby declared, that the said sum of 4500*l.* is to be the purchase-money for the said lands so to be taken by the said company as aforesaid for the formation of their railway, not exceeding eight acres, according to such deviated line as aforesaid, across the property of the said P. B. Webb described in the said plan, and for the consequential damage to such property.”

A memorandum of the same date was written at the foot of the agreement, and signed by the plaintiff's agent, in the following terms:—

* 523 * “ It is understood and agreed by and between the parties above named, that, in the event of the Act of Parliament referred to in the foregoing agreement not being obtained, the agreement for purchase hereinbefore contained shall be null and void.”

The plaintiff's case was that this agreement was entered into while the company's bill, empowering them to make the railway, was pending in Parliament, and that the consideration for it was the withdrawal of the opposition of the plaintiff, as a land-owner, to the bill.

On the 26th of June, 1846, the Act [the Direct London and Portsmouth Railway Act 1845 (*a*)] was passed. It contained a clause (*b*) providing that the railway should be completed within five years from the passing of the Act, and that on the expiration of such period the powers given to the company by that Act or the general Acts, for executing the railway, or otherwise in relation thereto, should cease to be exercised, except as to so much of the railway as should then be completed.

On the 5th of April, 1847, the company executed an indenture under their seal, whereby it was witnessed, that the company, in consideration of the withdrawal of the opposition of the appellant

(*a*) 9 & 10 Vict. c. 83.

(*b*) § 52.

to the therein mentioned bill, did thereby ratify and confirm the agreement of the 23d of July, 1845, made on their behalf by Messrs. Crowley, Baines, and Laurie, and did thereby, for themselves, their successors, and assigns, covenant with the appellant to perform, fulfil, and keep the covenants and agreements entered into by the said agreement by Messrs. Crowley, Baines, and Laurie. And the appellant, in consideration of the covenant before entered into by the * company, released Messrs. Crowley, * 524 Baines, and Laurie from the agreement.

The company had entered upon the land for the purpose of surveying, but had not in any other way taken possession of it. They had since abandoned the undertaking, and the time limited by their Act for taking the lands had expired. The Vice-Chancellor had made a decree for specific performance. The defendants appealed.

Sir W. P. Wood and *Mr. Mozon*, for the plaintiff. — The agreement is, in form and substance, unconditional; the consideration for it was valid and sufficient, being the withdrawal of opposition to the bill. The appellant thus precluded himself from making any other advantageous contract with respect to this land, and had a right, in the existing state of the law, to consider the purchase as made in equity. The contract could not be that the plaintiff was to be for five years in a state of uncertainty as to whether his land had been bought from him or not, and yet prevented from selling to any one else. *Bland v. Crowley*, (a) *Hawkes v. Eastern Counties Railway Company*. (b) In *Preston v. The Liverpool, Manchester, and Newcastle Junction Railway Company* (c) one of your Lordships held that, as the plaintiff had withdrawn his opposition to the bill in Parliament, the company, according to the true construction of the agreement, were bound to pay the sums agreed to be paid to him, although they had not taken possession of any part of his estate. And it was there said, "There was therefore nothing anomalous in stipulating for a fixed sum to be paid for the benefit of that assent, including also what was matter of lesser moment; namely, * the price of the land * 525 through which the railway would pass, whether for that purpose more or less might be required.

(a) 6 Exch. 522.

(b) 15 Jurist, 980.

(c) 1 Sim. N. S. 586.

[THE LORD JUSTICE LORD CRANWORTH. — In that case the plaintiff started from the point at which you have here to arrive; viz., that an absolute agreement had been entered into. Moreover, in that case the only remedy was in equity.]

[THE LORD JUSTICE KNIGHT BRUCE. — Nine-tenths of this agreement having become impracticable, do not you seek to have the tenth clause of it enforced without the rest?]

That state of things arises from the default of the defendants, of which they cannot claim any advantage.

Mr. Bethell, Mr. Malins, and Mr. W. J. Bovill, for the company. — The true construction of the agreement is that it is conditional only. The sum is to be paid, not only as purchase-money, but for damage in respect of severance, which has never taken place. The foundation of the relief by way of specific performance at the suit of a vendor who merely sues for money is mutuality, and cannot be rested on any other ground. Now in this case could the company enforce a specific performance after it had become illegal for them to hold the land? We challenge the other side to produce a case of specific performance at the suit of a vendor, where the purchaser could not have had the same relief. Could specific performance be enforced against a trustee of a breach of trust?

[THE LORD JUSTICE KNIGHT BRUCE. — Or suppose a contract by a foreigner to buy land.]

* 526 * A decree for specific performance is, in such a case, contrary to the principles recognized by this Court. A Court of Law is fully competent, and more competent than this Court, to administer complete justice.

[They referred to *Harnett v. Yielding (a)* and *Kimberley v. Jennings. (b)*]

Mr. Mozon, in reply. — During the argument the company offered to pay *Mr. Webb's* parliamentary costs not exceeding 150*l.*, and

(a) Sch. & Lef. 553.

(b) 6 Sim. 340.

all the costs of the suit, and also the sum of 500*l.* for compensation.

The case stood over that this offer should be considered by Mr. Webb. He ultimately refused to accept it, and the argument was resumed on the 22d of March. At its close the following judgment was given.

March 22.

THE LORD JUSTICE LORD CRANWORTH. — It is now, I believe, a fortnight ago since this matter was first brought before us, and both my learned brother and myself have had ample opportunity of turning the matter over in our minds several times since the former argument; and we think that it is not useful to detain the parties, but that we ought to give our opinion at once.

This is a claim the object of which is to seek the specific performance of a contract, or alleged contract, contained in a deed of covenant entered into by the defendants, binding them to carry into execution certain articles of agreement, entered into by three gentlemen, named Crowley, Baines, and Lawrie, with the plaintiff, on the occasion of the intended formation of the company.

* What the plaintiff says is, that, according to the true construction of that instrument, those three gentlemen bound themselves, among other things, to pay to him the sum of 4500*l.*, by way of purchase-money, for any eight acres of land of his, within certain limits, which the company should think fit to take for the purpose of making their railway. That the 4500*l.* was to be accepted by him as the purchase-money of the land from the company, and as the consideration for the consequential damage to his property. That the defendants, the company, after they had come into existence, pursuant to the Act of Parliament, entered into this deed, whereby they bound themselves to adopt as their own the contract, entered into by Crowley, Baines, and Lawrie; and now he asks, as against these defendants, specific performance of that which he alleges to be the contract; namely, a contract to purchase his property. * 527

The first question, and a very important one, is, whether, under the circumstances, there is any contract. Upon the view we take of this case, it does not become necessary for us to give any positive opinion upon that subject. In the case of *Preston v. The Lan-*

cashire Railway Company (a), which has been referred to, and which came before me when I was Vice-Chancellor, I gave the parties the opportunity of trying the question at law, but I do not apprehend that I had any doubt that there was in that case a contract to purchase. It has, therefore, no application to the question in the present case, whether there is in the circumstances which exist any contract to purchase at all. No doubt if the railway had been formed and the land had been taken, there was a contract that would have bound the parties; but the

* 528 railway not having been formed, * the question is, whether, under the circumstances, the contract to purchase ever arose.

On the part of the plaintiff, it is said that there was a contract to purchase in any event, except that mentioned in the memorandum at the end of the agreement. On the part of the defendants it is said that this is not the reasonable construction; and that if there should be no railway, there was no contract to sell or purchase at all; and that although the clauses of the agreement appear to be absolute in form, and provide that the company shall make a bridge over the railway, and do particular acts connected with the railway, yet that by necessary implication these acts were only to be done if the railway was formed, and were, therefore, conditional on the existence and formation of the railway. Assume, for the purpose of the argument, that the contract is such as is contended for by the plaintiff, viz., a contract, that the defendants should select a portion of the plaintiff's land lying within certain limits, not to exceed eight acres, and should take it for the purpose of the railway, and pay him 4500*l.* as the purchase-money for what they should so take, still it would be a question whether this is such a contract as ought to be specifically enforced; for, certainly, this Court will not interfere to decree specific performance of every contract. It interferes when by so doing it can do more complete justice than can be done in an action. Where a person has entered into a contract to purchase an estate, the mere legal remedy of recovering damages for the non-performance of the contract generally affords very inadequate relief, and from the earliest time this Court has interfered and compelled the vendor to do that specifically which he has engaged to do; namely,

to convey the land he has agreed to sell.¹ The same relief may also in general be had by a vendor who is merely seeking * payment of his purchase-money. Whether this has been done in order to give a right corresponding with that which is given to a purchaser, or for what other reason, we need not stop to inquire. There no doubt the Court will interfere. But even in the case of a suit by a purchaser, if there be circumstances rendering it unjust that the Court should be active, it will abstain from acting, and much more readily will the Court listen to an objection that is made against a vendor who is seeking specific performance, because of necessity the vendor can get complete relief at law.²

Looking then at that principle, let us see whether this is a case in which we ought to interfere. Suppose the instrument to amount to a contract to purchase, such as the plaintiff alleges it to have been. I think this is not only not a case in which we ought to interfere, but it is a case in which we should be making the machinery of this Court instrumental in doing injustice instead of justice; because the relief we must give would be to decree the payment of the 4500*l*. But what is the alleged contract? To select eight acres of the plaintiff's land, and take it from him; and for that eight acres, and for consequential damage, to pay the 4500*l*. Now, what the plaintiff would have to do at law, as I believe, would be to state in his declaration this contract, and to allege as a breach of it on the part of the defendants, that they had not taken the eight acres of land, nor paid the 4500*l*. The amount of damage would be there calculated, as I conceive, on the aggregate, resulting from taking all these circumstances into consideration, which would do complete justice; whereas, the relief that would be afforded in this Court would or might occasion positive injustice; it would give to the plaintiff 4500*l*. as the purchase-money for that which the defendants have not taken, and which, perhaps, they never * can now take. At * 530 all events, it is one of those cases in which, assuming the instrument to amount to what the plaintiff says it amounts to, a contract to pay 4500*l*. by way of purchase-money and compensation for damage to be done to other land, he has the ready means of obtaining complete redress at law; and we think to that redress

¹ See 1 Sugden V. & P. (7th Am. ed.) [234] 273 *et seq.* and notes.

² See 1 Sugden V. & P. (7th Am. ed.) [293] 345 *et seq.*

he ought to be left. Our opinion is, that this claim ought to be dismissed without prejudice to an action; but we do not think, under the circumstances, with costs.

THE LORD JUSTICE KNIGHT BRUCE. — I should myself have probably thought the obscurity of the agreement alone a bar against decreeing specific performance, but I am far from intimating that to be my only reason for concluding as Lord CRANWORTH has concluded. On the contrary, I agree in the main, if not wholly with what he has said. But I do not mean (nor do I believe does he) to express any dissent from the general doctrine or practice of the Court in ordinary cases where vendors of estates are plaintiffs seeking specific performance.

1852. March 6, 9, 15, 16. Before the LORDS JUSTICES.

A testator devised real estates upon trust for payment of his debts, funeral and testamentary expenses, and subject thereto upon various trusts; and bequeathed legacies and annuities. *Held* a case for marshalling at the instance of a legatee of an annuity where the personal estate had been exhausted in payment of debts.¹

THIS was an administration suit instituted by the executors of George Walker, the testator in the cause, who, after giving directions for his funeral, directed that all his just debts and funeral and testamentary expenses should be fully paid and satisfied by his executors, out of the fund thereafter provided for the payment thereof. And the testator gave and devised his freehold and leasehold messuages, tenements, and hereditaments situate at Pimlico or elsewhere, to trustees, upon trust for sale, and upon further trust that his said trustees, with and out of the moneys to arise from such sale or sales, and the rents and profits of the said hereditaments and premises until such sale pay and satisfy all his just debts and funeral and testamentary expenses, and the costs,

¹ 1 Lead. Cas. in Eq. (3d Am. ed.) 626 [526]; 2 *ib.* 208 [70], 213 [76], 249 *et seq.*; *Surtees v. Parkin*, 19 Beav. 406; *Rickard v. Barrett*, 3 K. & J. 289; 2 Jarman Wills (3d Eng. ed.), 588, 640, 642.

charges, and expenses attending the preparing for, making, and completing such sale or sales, or incidental thereto, and after payment thereof, should lay out and invest the residue of the said sale moneys in their joint names in the public funds, and stand possessed thereof, upon certain trusts for the benefit of the defendants for life, in different proportions, and after their decease for their children.

The testator then gave and bequeathed to the appellant, if he should be living in the testator's service at the time of the decease of the testator, an annuity of 30*l.* to be paid to him for his life free from taxes, and clear of all deductions whatsoever, by equal half-yearly payments, the first half-yearly payment to begin and be made at the end of six calendar months next after the testator's decease. * And he bequeathed all his goods, * 582 chattels, &c., and all other his personal estate and effects "not thereinbefore by him otherwise disposed of, after and subject to the payment of his just debts and funeral and testamentary expenses and the annuities bequeathed by his said will," unto Hannah E. C. Scott, one of the defendants.

There were four codicils to the will.

The freeholds and leaseholds devised to the trustees were mortgaged by the testator to a very considerable extent, and the personal estate amounting to about 4000*l.* only, was insufficient to pay the testator's other debts by specialty and simple contract.

By the decree on further directions made on the 20th of March, 1850, it was declared that the testator's debts and funeral and testamentary expenses were primarily payable out of his personal estate not specifically bequeathed, and that the deficiency of such general personal estate to pay and satisfy the same, was raisable and payable out of the proceeds of the testator's freehold and copyhold estate and premises, devised by his will and codicil upon trust for sale; and it was further declared that the several pecuniary legacies and annuities given by the will and codicil of the testator, other than and except an annuity of 40*l.* a year given by a fourth codicil to Elizabeth Ogbourne, were payable out of the testator's personal estate, not specifically bequeathed, so far as the same after payment of the testator's debts and funeral and testamentary expenses, were sufficient for that purpose; and that such pecuniary legacies and annuities were not, nor were any of them, payable out of the freehold and leasehold estates devised in trust for

sale as aforesaid; and with these declarations it was ordered that it should be referred back to the Master to review his report.

* 533 * Against this decree the appellant, who was not a party to the cause, obtained leave to appeal, and the appeal now came on to be heard.

Mr. Moxon, in support of the appeal. — Upon the language of this particular will, the real estate is primarily liable to the debts and funeral and testamentary expenses. In *Hancox v. Abbey*, (a) Sir WILLIAM GRANT, while he acknowledged the general rule, that a devise to sell for payment of debts would not exonerate the personal estate, yet held that the devise in that case, though unaccompanied by any words of exoneration, was sufficient; as the whole will showed the testator only intended the devisee to take the residue after payment of the sums there in question. So here the testator has evidently intended all his real estate to be sold, and only the surplus produce, after payment of the debts, to be held upon the trusts.

Mr. Rolt, *Mr. Cole*, and *Mr. Beavan*, for the respondents, were not called upon.

The Lord Justice Lord CRANWORTH referred to *Collis v. Robins*, (b) and said that there did not appear to be sufficient in the will to exonerate the personal estate.

The Lord Justice KNIGHT BRUCE, after referring to the cases of *Boote v. Blundell*, (c) *Lutkins v. Leigh*, (d) *Forrester v. Lord Leigh*, (e) *Wythe v. Henniker*, (g) inquired if it had occurred to the appellant's counsel to consider whether the mortgages ought not to be thrown primarily on the mortgaged estates.

* 534 * On the application of the appellant's counsel, the Court allowed the appeal to stand over to be discussed with reference to the point suggested.

March 16.

On this day, *Mr. Moxon* contended that as the real estates were charged with the debts, the pecuniary legatees and annuitants were

(a) 11 Ves. 179.

(b) 1 De G. & S. 131.

(c) 19 Ves. 494.

(d) Ca. temp. Talbot, 53.

(e) Amb. 172.

(g) 2 M. & K. 635.

entitled to have the assets marshalled, and to stand in the place of the specialty and simple contract creditors, to the extent to which they might exhaust the personal estate. He cited *Ram on Assets*, 424, 2 *Jarman on Wills*, 546 and 601, and *Foster v. Cook*, (a) *Bradford v. Foley*, (b) and *Webster v. Alsop*. (c)

Mr. Beavan, for a respondent in the same interest, referred to *Norman v. Morrell*, (d) *Haslewood v. Pope*, (e) *Arnold v. Chapman*, (g) and *Aldrich v. Cooper*. (h)

Mr. Cole, for the other respondents. — The course of modern authorities shows that there is no marshalling in such a case as the present. *Mirehouse v. Scaife*, (i) *Wythe v. Henniker*. (k) As the testator has not only charged the real estates with his debts, but his personal estate also, there is no reason to marshal as between two parties who were equally the objects of the testator's bounty. But if there should be any marshalling there ought to be an apportionment, and the debts thrown ratably on the freeholds on the one hand, and the personal estate on the other. *Headley v. * Redhead*. (l) And in any event the doctrine has * 535 never been held to apply to funeral expenses.

He also cited *Herne v. Meyrick*, (m) *Clifton v. Burt*. (n)

Mr. Moxon was not called upon in reply.

THE LORD JUSTICE LORD CRANWORTH. — We are both of opinion that the doctrine of marshalling is applicable to this case, and that the cases of *Foster v. Cook*, *Norman v. Morell*, and the dicta of Lord ELDON in *Aldrich v. Cooper*,¹ apply to it. In *Aldrich v. Cooper*, Lord ELDON went rather out of his way, and seems expressly to have recognized the doctrine of marshalling as applica-

(a) 3 Bro. C. C. 347.

(b) *Ibid.* 351.

(c) *Ibid.* 352; and see *Haslewood v. Pope*, 3 P. W. 323; *Arnold v. Chapman*, 1 Ves. sen. 110.

(d) 4 Ves. 769.

(k) 2 M. & K. 635.

(e) 3 P. W. 323.

(l) Sir G. Coop. 50.

(g) 1 Ves. sen. 110.

(m) 1 P. W. 201.

(h) 8 Ves. 396.

(n) 1 P. W. 679.

(i) 2 M. & C. 695.

¹ See the notes to this case, 2 Lead. Cas. in Eq. (3d Am. ed.).

ble to such a case as the present. "The case," observed his Lordship, "is exactly the same with reference to the distinction taken, that where lands are specifically devised, the legatees shall not stand in the place of the creditors against the devisees ; for that is upon the supposition that there is in the will as strong an inclination of the testator in favour of a specific devisee as a pecuniary legatee, and therefore there shall be no marshalling. But if, though specifically devised, the land is made subject to all debts, that distinguishes the case, for there is a double fund ; and as, by that denotation of intention, the creditor has a double fund — the land devised and the personal estate — he shall not disappoint the legatee." It is true this was only a *dictum* of Lord ELDON, but it is fully borne out by the authorities, which show that the doctrine of marshalling is applicable to this case.

* 536 * THE LORD JUSTICE KNIGHT BRUCE. — It is true, as Lord CRANWORTH has stated, that the passage he has read from *Aldrich v. Cooper* is only a *dictum* of Lord ELDON. But a *dictum* of that distinguished Judge is almost as valuable as a decision. The authorities seem clear ; and the Statute 3 & 4 Will. 4, c. 104, although passed to render real estate liable for simple contract debts, seems rather to favour the doctrine of marshalling in such a case than otherwise. The order will be to declare that the pecuniary legatees and annuitants are entitled to stand in the place of the mortgagees, and specialty and simple contract creditors, in respect of the produce of the freehold and leasehold estates devised in trust for sale, and for payment of debts, to the extent to which they have exhausted or will exhaust the general personal estate.

Mr. Cole applied for the costs, as the appellant had failed upon the ground on which he disputed the decision of the Court below ; but the Court directed the costs to come out of the estate, and the deposit to be returned.

[412]

* In the Matter of CATHERINE CUMMING, a Person * 537
found to be of Unsound Mind.

1852. March 17, 27. April 2. Before the Lord Chancellor Lord St.
LEONARDS, and the LORDS JUSTICES.

Held, on application to the Lord Chancellor for that purpose by a person found lunatic under a commission, that leave to traverse the inquisition is matter of right.¹

The same holding applies to a similar application by another person having an interest, *semble*.

The fact of the traverse being of right does not, however, preclude the Lord Chancellor from exercising such a control over the matter as may be necessary for the protection of the person and estate of the alleged lunatic, as, for instance, by satisfying himself that the application is *bond fide*, and that the alleged lunatic, where he is the person applying, is competent to judge of what he is doing and is really desirous that the traverse shall issue.

Whether, if the Lord Chancellor should not be otherwise able to satisfy himself on the points above mentioned, he would allow any and what evidence to be gone into respecting them, *quære*.

Where the Court considered it expedient in the circumstances of the case that, pending a traverse, the system of personal care of the supposed lunatic should not be disturbed, and that she should continue to receive her income, the appointment of committees and the execution of the grant were not stayed on that account, but the order for the appointment and grant was qualified by the introduction of directions to the above effect.

A COMMISSION having issued in pursuance of an order made by the Lords Justices, dated the 22d December, 1851, at the instance of the daughters of Mrs. Catherine Cumming and their husbands, to inquire of the lunacy of Mrs. Cumming, an inquisition was taken in January, 1852, by which it was found that she was a person of unsound mind, and had been in a state of unsoundness of mind from the 1st May, 1846.

Mrs. Cumming then presented a petition to the Lord Chancellor, stating the facts above mentioned, and further stating that she, the petitioner, was and always had been of sound mind, and that

¹ *In re Wendell*, a Lunatic, 1 John. Ch. 600; *In re M'Clean*, 6 John. Ch. 440; *In re Hanks*, 3 John. Ch. 567; 2 Story Eq. Jur. § 1365; *In re Lasher*, 2 Barb. Ch. 97. In most of the United States there is no general jurisdiction in chancery, over either the person or property of lunatics. *Dowell v. Jacks*, 5 Jones Eq. 417.

she was aggrieved by such inquisition, and was desirous to traverse the same: the petition prayed that she might be at liberty to traverse the inquisition, and that, in the mean time, all further proceedings before the Master in Lunacy in the matter might be stayed, or that such further or other order in the premises might be made as should seem meet.

* 538 * It may be well to mention that the inquiry under the commission lasted sixteen days, there being a great mass of conflicting testimony, and numerous witnesses being examined on each side. Nine medical men were called in support of the commission, and the same number on behalf of Mrs. Cumming. The jury were, however, unanimous in their verdict, and the commissioner expressed no dissatisfaction with the finding.

The present petition was originally brought on before the Lords Justices; but in consequence of the importance of the point, and the alleged conflict of authority upon it, application was made to the Lord Chancellor to have the petition heard before the full Court of Appeal on the question of law. The parties on both sides abstained from filing affidavits on the general question of the state of mind of Mrs. Cumming.

Mr. Bethell, Mr. R. Palmer, and Mr. Southgate, in support of the petition. — The question here is, whether a person who has been found lunatic by inquisition is entitled, as of right, to traverse that inquisition. In reviewing the authorities on the point, the judgments of Lord HARDWICKE and Lord THURLOW appear to be opposed to those of Lord ROSSLYN, Lord ELDON, and Lord COTTENHAM: we submit, however, that the traverse is of right. In tracing the jurisdiction exercised by the Lord Chancellor in such matters, it will be found referable first to the Statute of 17 Edw. 2, c. 10, embodying the principle that, by the common law of England, the Crown is entitled to the custody of the lands of a lunatic: then followed the Statute of 36 Edw. 3, c. 13, by which a general right was given to traverse inquests of office taken before escheators:

* 539 this right, however, was not * held to apply to commissions of lunacy until the 2 & 3 Edw. 6, c. 8, by the 6th section of which it was enacted, “Also, where one person or more is or shall be founden heir to the king’s tenant by office or inquisition where any other person is or shall be heir, or if one person or more be or

shall be founden heir by office or inquisition in one county and another person or persons is or shall be found heir to the same person in another county, or if any person be or shall be untrue founden lunatic, idiot, or dead; be it enacted by the authority aforesaid, that every person and persons grieved or to be grieved by any such office or inquisition shall and may have his or their traverse to the same immediately or after at his or their pleasure, and proceed to trial therein and have like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices founden, any law, usage, or custom to the contrary in anywise notwithstanding." Such being the state of the law, it may not at first appear easy to see what necessity there was for applying to the Lord Chancellor for leave to traverse; but this is explained by the fact that the practice has been adopted in order that the Lord Chancellor may be satisfied of the general truth of the case, and of the competency of the party to make the application, and further, by the consideration that the jurisdiction appealed to in these cases is not that exercised by the Lord Chancellor as head of the lunacy jurisdiction, but as the head of this Court in its character of the Grand Officina Brevium.

Looking next at the authorities, it must be admitted that in *Ex parte Roberts*, (a) Lord HARDWICKE, in granting the traverse, expressed a doubt whether the application was of right; but the point did not directly come before him for decision: and in the same lunacy his Lordship, in refusing a traverse after the death * of the lunatic, (b) said, "The alienee of a lunatic may * 540 traverse an inquisition as well as the lunatic himself." In *Ex parte Barnsley*, (c) also before Lord HARDWICKE, an application was made to traverse a second inquisition, not by the lunatic herself, but at the instance of her husband, and it was refused, for, as his marital right was not affected, the husband could not be considered as a party grieved within the meaning of the 6th section of the Statute 2 & 3 Edw. 6, c. 8. In *Ex parte Southcote*, (d) which was not an application for leave to traverse, but for an inquisition, the state of the law on the former point is referred to, and is stated as being that anybody may apply on behalf of the lunatic to traverse or supersede the commission, but that the lunatic must in

(a) 3 Atk. 5.

(b) 3 Atk. 308; see p. 312.

(c) 3 Atk. 184.

(d) Amb. 109; S. C., 2 Ves. 401.

either case appear to be examined *coram rege in concilio*, meaning, by these words, the Court of Chancery. The inference is, that the holder of the Great Seal, on being satisfied that such an application was in truth the act of volition of the supposed lunatic, would grant it as of course. In the case of *In re Fust*, (a) Lord THURLOW refused leave to traverse as of right, following what he believed to have been previously decided by Lord HARDWICKE. All, however, as we submit, that is fairly deducible from what Lord HARDWICKE did, is, that in the case of a stranger he refused the application, and in reference to the lunatic himself did not determine the point now in question. Lord ROSSLYN, however, in *Ex parte Wragg*, (b) in allowing the traverse, expressly laid down that "it is matter of right at law;" and again, in *Ex parte Ferne*, (c) he states that "the traverse is *de jure*, it is no favour." The matter frequently came before Lord ELDON: in *Sherwood v. Sander-son*, (d) speaking of the *right to traverse, his Lordship says, "When the determination of the party to traverse is made known, I am bound to put the soundness of the verdict in that course of inquiry:" and in *Ex parte Ward*, (e) where the application for leave to traverse the inquisition was by an entire stranger without any interest, Lord ELDON refused it expressly on that ground, but said, that the law had "given a positive right to certain persons to traverse the inquisition."

There is no instance in which the traverse has been refused when applied for by the lunatic himself. The case of *Ex parte Saumarez*, (g) was a petition by the lunatic and his wife for leave to supersede the commission or for a traverse; it was refused, but on what grounds does not appear. All the authorities bearing on the subject were reviewed by Lord COTTENHAM in *In re Bridge*, (h) and his Lordship in that case granted a traverse as matter of right, expressing his opinion, after an interview with the party, that "nothing could be more manifest than his delusions upon one subject." Lord TRURO acted in the same way in *Ex parte Hartley*, and *Ex parte Loveday*, and several other instances, none of which are reported.

(a) 1 Cox, 418.

(b) 5 Ves. 450.

(c) 5 Ves. 832.

(d) 19 Ves. 280; see p. 287.

(e) 6 Ves. 579.

(g) Cr. & P. 342 n.

(h) Cr. & P. 338.

The result, as we submit, is that the present application ought to be granted as of right, subject only to the Lord Chancellor being satisfied that it is really the application of the party in whose name it is made, and that the party is able to exercise an act of volition with regard to it.

The Attorney-General, Sir W. Page Wood, Mr. Rolt, Mr. Petersdorff, and Mr. W. Morris, contra.—The right to traverse in cases of inquisition of lunacy * is a right expressly * 542 conferred by statute, and with certain qualifications. The Act 2 & 3 Edw. 6, c. 8, gives the “like remedy and advantage as in other cases of traverse upon untrue inquisitions;” and on turning to the Statute 8 Hen. 6, c. 16, we find that, referring to the previous Statute 36 Edw. 3, c. 13, it in effect gives the traverse in reference to lands to such parties as “show good evidence proving their traverse to be true.” It is to be observed that the right granted by the 6th section of the Act 2 & 3 Edw. 6, c. 8, is conferred on those only who have been “untruly founden” lunatic, clearly, therefore, pointing to some preliminary investigation.

[THE LORD CHANCELLOR.—Is it contended that a party who has been found lunatic and is desirous of traversing, has the same obligation cast upon him of proving his state of mind as a man whose lands have been taken away from him has to prove his title?]

What we submit is, that the party must show reasonable grounds for the allegation that the finding is wrong. In the case of the King, a *melius inquirendum* will only be granted when there is a “proper surmise of pregnant matter:” *Ex parte Duplessis*; (a) and we contend that a subject cannot be in a better position. *Sir John Cutts’s Case*, (b) *Scowrefield’s Case*, (c) Buller’s *Nisi Prius*, page 216, are in favour of the view for which we contend.

There is no such proposition recognized by the Courts of common law, as that an inquest of office is traversable as of right; all that is meant by the expression, when made use of by Judges and text writers, is, to draw a distinction between an inquest and judgment, and as to the right of traversing the one when compared * with reversing or impugning the other. There * 543 are some inquests which cannot be traversed at all, and

(a) 2 Ves. 555. (b) *Ley’s Reports*, 26. (c) *Ley’s Reports*, 22.

where they can be traversed the Court requires to have all the materials brought before it for forming a judgment on the propriety of the proceeding.

With regard to the decisions more immediately in point, we rely on the authority of Lord HARDWICKE in *Ex parte Roberts*, (a) and *Ex parte Barnsley*, (b) followed by Lord THURLOW in *In re Fust*: (c) Lord KING also, in an anonymous case, (d) appears to have acted in the same way. The first decision of a contrary character is that of *Ex parte Wragg*, (e) by Lord ROSSLYN; but it does not seem that the matter was fully discussed, and it must be regarded as a very unsatisfactory case, if it is to be held as overruling the course of practice previously laid down.

As to the cases before Lord ELDON, it appears that he was in the habit of dealing with them on merits: this is clear as to *Ex parte Ward*, (g) as to *Ludlam's Case*, (h) and also as to *Ex parte Saumarez*. (i) In fact, Lord ELDON's authority as to the traverse being a matter of right, is based on *dicta* only; he never expressly decided the point, and he acted in a manner contrary to his so holding: in *Sherwood v. Sanderson*, (k) which has been referred to, the question was not raised.

The only case which came before Lord BROUGHAM was *Ex parte Tubb* (not reported), and in that the merits * were gone into. When then the matter came before Lord COTTENHAM in *In re Bridge*, (l) the state of the authorities was conflicting. Lord KING, Lord HARDWICKE, and Lord THURLOW had held the granting of the traverse to be a matter of discretion; Lord ROSSLYN had held it to be a matter of right; and Lord ELDON had expressed opinions favouring the latter view, but had contradicted them by his course of acting: Lord COTTENHAM, however, seemed to consider himself precluded by authority, and was especially influenced by the opinion expressed on the subject by Lord ELDON, the cases before whom, and especially that of *Ex parte Saumarez*, not having, however, been particularly investi-

(a) 3 Atk. 5.

(b) 3 Atk. 184.

(c) 1 Cox, 418.

(d) Mosely, 71: this would seem to be the case referred to by Lord HARDWICKE in 3 Atk. 7, as the case of Mrs. Smithie, and as *Ex parte Smith* in 3 Atk. 185.

(e) 5 Ves. 450.

(g) 6 Ves. 579.

(h) See Collinson on Lunatics, Vol. I. pp. 167, 172; Vol. II. pp. 735, 741.

(i) Cr. & P. 342 n.

(k) 19 Ves. 280.

(l) Cr. & P. 338.

gated. It is also to be borne in mind that all the cases prior to *In re Bridge* occurred before the passing of the Act 6, Geo. 4, c. 53, by which the Lord Chancellor is directed "to hear and determine" petitions to traverse inquisitions, which would be idle if the Lord Chancellor could exercise no discretion in the matter. The distinction which has been attempted to be drawn between the case of a stranger and the lunatic himself is untenable: it is conceded that the traverse is not of right as to the former, and if so it cannot be as to the latter; both must rest on the same principle.

Mr. Bethell replied. — He commented on the construction put by the other side on the Statute 8 Hen. 6, c. 16, which he submitted was quite inaccurate, and also on the cases referred to in the previous argument. He observed, that one reason for coming to the Lord Chancellor by petition was, that it rested in the discretion of the Great Seal to suspend the proceeding under the commission, and on this account it was also necessary to serve the heir and next of kin; that the Statute 6 Geo. 4, c. 53, so far from affording an argument against the present * appli- * 545 cation, evidently proceeded on the assumption that the traverse was a matter of right; and that the only exception to the right contended for would be where the Court saw that the supposed lunatic could exercise no discretion, or where the application being by a stranger, that party had no interest.

[In addition to the authorities above noticed, the following were referred to in the course of the argument: *Doe v. Redfern*, (a) *Ex parte Hall*, (b) *In re Sadler*, (c) *Ex parte Sir Gregory Page Turner*, (d) Co. Litt. 77 b.; 34 Edw. 3, c. 14; 18 Hen. 6, c. 6; 1 Hen. 8, c. 10.]

[Shortly after the opening of the case on the 17th March, the Lord Chancellor observed that Mrs. Cumming ought to be in attendance that she might be personally examined if it should be found necessary; and he desired that she might be sent for, adding, however, that she was not to be brought at any peril to her health, in which case an affidavit of her medical attendant should be made. An affidavit to this effect was produced in the course of the morning, and the further hearing being then adjourned until the 27th

(a) 12 East, 96.

(c) 1 Madd. 581.

(b) 7 Ves. 261.

(d) Cr. & P. 349 n.

March, Mrs. Cumming attended on that day, and was seen by the Lord Chancellor in his private room before the argument was resumed.]

THE LORD CHANCELLOR. — The question which has now been argued, though one of great importance even in a constitutional point of view, lies within a very narrow compass: it is whether, in a case like the present, liberty is to be given to traverse the finding of the jury upon a commission against a person * 546 who by that finding has been declared *lunatic, and whether this liberty is, to use the term which has always been applied to it, “as of right:” the consideration of what is the true meaning of the expression “as of right,” I shall postpone until I have determined whether or not the liberty to traverse is of right.

The whole question depends in the first instance upon the Statute 2 & 3 Edw. 6, c. 8, the 6th section of which, after providing for other cases, is in the following words: “If any person be or shall be untruly founden lunatic, idiot, or dead, be it enacted, by the authority aforesaid, that every person or persons grieved or to be grieved by any such office or inquisition shall and may have his or her traverse to the same, immediately or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices founden.” Much reliance has been placed on these last words “and have like remedy,” &c.; and in order to show that there is no absolute right of traverse, or that the Court is bound, before granting an application like the present, to enter into the whole question which was before the jury, reference has been made to the ancient statutes regarding escheators; the proposition being that under those statutes there could be no issuing of a traverse in the cases of escheats generally, until the title of the party had been established and proved, and that so in the case now before the Court, the words to which I have already referred, giving the party the like remedy and advantage as in other cases of traverse upon untrue inquisitions, requires a title to be shown before the application can be granted. This argument, however, proceeds upon a mistake, because the right given to a party in regard to lands and upon ordinary escheats was not only the * 547 right to traverse, but was also the right to have the * lands

demised to him for a certain time during the existence of the trial: the party asserting his right to traverse as against the Crown had that right, and on showing his title to the satisfaction of the Chancellor had also a right to have the very lands which he claimed demised to him, so as to secure to the Crown a rent if he turned out to be wrong, and to secure to himself the possession of the lands if he turned out to be right. This matter is put wholly out of the question, and is explained in the way I have stated by Staunford in his book on the King's Prerogative, a work of great authority. After mentioning several of the old statutes, and lastly that of the 8 Hen. 6, c. 16, which have been relied on as governing the present case, he says (Cap. 20, Traverse, p. 68), "Hereupon is to be noted that the showing of the evidence is only rehearsed to the letting of the lands to farm, and not to the traverse, for by this statute he may traverse without showing any evidence, but not have the lands to farm. Also, by these statutes, he is not bound to no certain time for taking of his traverse, but only for taking of the lands to farm; for he may tend his traverse, when he will, so he desire not the farm of the lands. But if he will have them to farm, he must tend his traverse within the month."

If the point was about to be decided for the first time upon the meaning of the Statute of 2 & 3 Edw. 6, I might say that words could hardly be stronger to give to a party what is called the right to traverse: it is to be "at his pleasure," governed indeed by the usual laws regarding traverses, so far as they are applicable, and upon an allegation also that the party is untruly found lunatic; and this would necessarily be so, for otherwise there would be no ground for the traverse. Thus, then, the Act of Parliament, although perfectly clear in its terms as to the right, does not exclude the exercise of a *certain discretion in the * 548 Court, in order that it may be seen whether the allegation required be or not untrue to a certain extent.

With regard to the authorities, there is no assistance to be derived from them at any early period; for the cases in the Court of Wards, into some of which I have looked, do not bear so fully upon the point as to justify the Court in placing any reliance upon them. We come down, therefore, at once to the time of Lord HARDWICKE; and although in the instances which have been referred to, he did put it in some sense as matter of right, yet it is

impossible to deny that he went into and examined the circumstances of each case, in order to satisfy his mind that it was proper for him to grant a traverse.

But here arises the question how it happened that, if there was an absolute right, the Chancellor was applied to at all, and why the party did not at once go into the Petty Bag office and lodge his traverse. I shall presently state a case in which a party appears to have taken this course, and to have taken it, although objected to, without its being interfered with; and I do not desire to say any thing which shall touch the question whether a party might not, irrespective of the Statute 6 Geo. 4, act in the same manner now. It is, however, very plain why petitions were presented to this Court. The traverse cannot take place until the party has been found lunatic on a commission issued by the Great Seal, which is followed by the grant of the custody of the person and estate. This being so, no one would, generally speaking, attempt to traverse the inquisition without the leave of the Great Seal, because otherwise he would have no security for the reimbursement of his costs of thus defending the interest of the lunatic. A person going behind the back of the Court, and

* 549 exercising his legal right (if he had *it), could hardly come and ask for his costs, as he would do in respect of a proceeding taken under the authority of the Great Seal. The Chancellor also fills different offices; by virtue of the sign-manual he has jurisdiction over lunatics, he has besides jurisdiction in Chancery, and on the common-law side of the Court he has the duty of issuing the very writ which is called for in these cases. From all these considerations there is no difficulty in seeing how it was that petitions for leave to traverse came to be presented to this Court; and this being so, the Lord Chancellor has always exercised not so much a discretion, as a care and caution in the issuing of the writ.

Reverting again to the authorities, — they have all been fully referred to in the argument, and it is not necessary for me to go through them, — my own impression is that Lord HARDWICKE went further in respect of evidence than other Judges later than himself would have done. Lord THURLOW, no doubt, in *In re Fust* (a) following Lord HARDWICKE, entered into the circumstances of the

(a) 1 Cox, 418.

case, but I am not certain that he was at all wrong in so doing. A man had married a woman in a way which rendered it necessary to impeach the marriage; a commission would have enabled the parties to do this, and the traverse would have had the effect of defeating the attempt: under these circumstances the Chancellor, seeing the indirect and improper purpose for which the proceeding was intended to be used, refused leave to traverse. As regards the later cases, it is clear that every successive Chancellor, from Lord THURLOW down to the present time, has been of opinion that the issuing of the writ is in some sense or other a matter of right. Lord ELDON's opinion upon the point is perfectly clear; and how he acted upon it I shall presently * consider: over and * 550 over again he, the most cautious Judge in enunciating a rule of law that ever sat in this Court, states it without any limit to be a matter of right; he even so states it as regards the right of a stranger. In *Ex parte Hall*, (a) he says, "There are two views in which this case is to be considered; first, as to the right of the petitioner to traverse. It strikes me as extraordinary to say, that a person who had become the *bond fide* owner in equity of two advowsons under contract, is not aggrieved by the finding that the party with whom he contracted has been a lunatic ten years. If, however, decisions would exclude him, he would be entitled only to that regard which the Court has been in the habit of giving in lunacy particularly: but the case *Ex parte Morley* proves that a person under such a contract is a party aggrieved; and I am of opinion upon that case he has a right, and must be permitted to traverse." Lord ELDON, therefore, thought that the right to traverse extended as well to another person having an interest as to the case of the alleged lunatic himself; and in *Ex parte Ward* (b) he did not decide against that right, but only looked with a natural jealousy to the application of a person not connected with the family, and having no individual interest in the matter. I am far from saying that it may not be proper in some cases for a person other than the alleged lunatic to apply; but generally speaking, where there is not an interest, the alleged lunatic must be the most proper party to impeach the commission. As regards the other authorities, the opinion of Lord ROSSLYN admits of no doubt: Lord LYNTHURST was never called upon to express any: Lord BROUGHAM

(a) 7 Ves. 261; see p. 263.

(b) 6 Ves. 579.

in *Ex parte Tubb*, (a) which came before him in July, 1834, did not decide the point, but made this observation in reference * 551 to it, — “My predecessors seem to have considered it as a matter of right;” and he did nothing in opposition to that declaration: Lord COTTENHAM’s authority is express on the point; and Lord TRURO twice acted upon the decisions of his predecessors and treated the traverse as a matter of right. The authorities therefore, as far as they go, are conclusive in favour of the application.

There is, besides, a case of Gervase Heely (b) in 1748, where the party seems to have gone to the Petty Bag office, and to have exercised the right of entering a traverse, without the intervention of the Court: a petition was then presented to Lord HARDWICKE on the 6th April, 1748, stating that the petitioners, the cousins and co-heirs of the lunatic, had received a notice in writing on the 11th February, 1747, that Gervase Heely had the day before filed a traverse in the Petty Bag office to the commission and inquisition, notwithstanding no order was obtained from the Lord Chancellor for leave to file the same, and the petitioners were informed that John Kent and Mary Paine, who had the custody of the lunatic, had of their accord given orders and directions in Mr. Heely’s name for filing the said traverse, Mr. Heely being incapable of directing the same, or knowing the meaning or import of such proceeding; and the petitioners prayed that the traverse might be discharged. It does not appear that any order was made at that time; but a petition was subsequently presented in the same matter on the 9th January, 1749, by the recitals of which it appears that by an order of the 21st May, 1748, the custody and management of the lunatic’s estate was ordered to be granted to Thomas Plimmer, and the consideration of the costs of the petition upon which such order * 552 was made, was reserved until the traverse should * be tried, or there should be delay in carrying the same down to trial: the petition also states that before the traverse could be tried, Gervase Heely died. Thus there was a traverse filed in the Petty Bag office in the name of the lunatic, filed, as it was said, without his assent and as of right, the parties not coming to the Court at all; and it is manifest, as it appears to me from the subsequent order,

(a) The proceedings in this case will be found referred to in Elmer’s Lunacy Practice, p. 177.

(b) See 3 Atk. 635.

that Lord HARDWICKE left that traverse to be tried without interfering with it. Search has been made in the Petty Bag office to ascertain whether the traverse was ever taken off the file, and it has been reported to me that the traverse was filed on the 10th February, 1747, and the Attorney-General's replication to it on the 28th June, 1748, but that no further proceedings can be found. This seems to be a very strong authority to show that, at that time, the traverse was not only considered as of right, but so much so, that if a party chose to go behind the back of the Lord Chancellor and file his traverse in the Petty Bag office, he was entitled to do so and carry the matter down to trial. The Attorney-General having replied, it would have gone to trial, and Lord HARDWICKE'S subsequent order reserves the costs of the petition until the traverse should be tried or there should be delay in doing so.

In regard to Lord ELDON'S opinion on the matter in question, there is a case in the Lunacy office, *Re Thomas Millson*, from which it appears that on the 10th February, 1825, his Lordship made an order by which, after reciting a petition presented by the lunatic for a traverse and also a petition presented by the lunatic's son-in-law praying to be appointed committee *ad interim* of the estate, he directed that Richard Clement should be appointed *interim* manager of the farm and lands until further order, and ordered him to produce the lunatic before his Lordship at Lincoln's Inn on the *12th February then instant. A note *558 was taken by the present Vice-Chancellor, Sir GEORGE TURNER, of which there is a copy in the office, of what fell from the Court upon that occasion. Lord ELDON said, "I will see the person who is the object of this commission, and learn from him whether it is his real intention to traverse. The decisions have been that the party has a right to traverse, and I take it to be clear that, if any other person than the party the object of the commission has an interest inducing him to apply for liberty to traverse, there can be no objection to his traversing, but there is a right to call upon him to do it within a limited time. With respect to the party himself, I am not quite so confident as I have been that there is not a right to limit him as to time." Thus it appears that in this case Lord ELDON retained the opinion which he had so often expressed, that not only the alleged lunatic had the right, but even a person having an interest in point of estate.

It seems difficult, therefore, to deny that the authorities in favour of the right are entitled to very great weight; and it would require much deliberation and judgment, and a strong feeling in the mind of any Judge who should venture to oppose his own opinion to such authority. I am not disposed to do so, because I entertain no doubt but that the opinions expressed by the many eminent and learned persons to whom I have referred, are authorized in the fullest manner by the true meaning and spirit of the Act of Parliament upon which they are founded; and if I had to decide the case in the first instance, I should have come to the conclusion to which I now arrive, which is, that it is the right of the party to traverse in a case of this nature. I am clearly of opinion that the Act of 6 Geo. 4, c. 53, does not affect this question.

* 554 A point, however, of a very different sort remains * to be considered, and that is, although it is of right to traverse the inquisition, how the Court is to deal with that right. It is impossible to deny that, in the cases which have been cited, the Lord Chancellor has addressed himself to the consideration generally of whether it was proper that the writ should issue; but whether the determination of that question should depend upon an examination of the lunatic, or upon such affidavits as the parties might think fit to file, would of course be greatly affected by the decision whether in any proper sense the issuing of the traverse is of right or not; because, if it is of right, which I will now treat as decided, the matters to which the Court would address its consideration upon the subsidiary point would be very different from what they would be if the traverse was not strictly of right. Although of right, the issuing of the writ is still, as it ought to be, under a certain control: for example, if a petition was presented to me, and on calling, as I necessarily must do in every such case, for the presence of the alleged lunatic,¹ I saw instantly the signs of absolute raving madness, nobody can imagine that I should be at liberty to allow the writ to issue. In such a case there could be no untrue allegation, and therefore no necessity for the traverse; the protection which it is the duty of the Great Seal to throw around a person who has been found a lunatic by a jury upon a regular trial, for the protection of his person and estate, would compel a denial of the right to traverse. In some of the cases,

¹ *In re Hanks*, 3 John. Ch. 567.

particularly in those before Lord HARDWICKE, and in one or two of those before Lord ELDON, it cannot be denied that matters were entered into which, according to the strict interpretation of the words "as of right," one would hardly have expected; but I am not surprised, recollecting that parties are left to their discretion in filing affidavits, to find that the Court, being pressed with particular circumstances and affidavits * being on the * 555 file, has in many cases gone into them to a certain extent.¹

I cannot, however, admit this to be an authority in favour of that which is contended for against the right to traverse; namely, that I am to enter into all the evidence which was before the jury, and to consider the application as if it were one for a new trial.

This brings me to the question what I am to do with reference to the present case. There is no doubt that my first duty is to be satisfied that the application is *bonâ fide*, that the alleged lunatic herself is competent to judge, and that she really does desire to have a traverse against the finding. If I had any doubt upon that point, or if I felt upon the examination of the alleged lunatic that it was uncertain what her intentions were, and that she herself did not know her own mind, or was not capable of coming to a clear conclusion, I do not say that in such a case I might not feel myself at liberty to hear evidence of her state of mind, to see by what parties she was surrounded, and who were applying for the traverse on her behalf, and what were their objects and views. This is a matter which I am not going now to decide; it will be time enough to enter into the consideration of it when the question arises. The case now before me is one in which the Court will decide that the traverse is of right, in the proper sense of that term. I have myself, not throwing that duty upon my Lords Justices, whose powerful assistance I have had upon the point of law, examined Mrs. Cumming, and have represented to her what the consequences of this traverse may be in point of expense. I have had a long conversation with her, and I am bound to say that upon this point she is as reasonable, as composed, as free from heat or passion or violence of any sort, as any person with whom I ever conversed. She desires that this traverse may issue; she is aware that it may put in peril the remainder of her * property, or nearly so; but she is content to make this * 556 sacrifice for what she terms her liberty of action. She has

¹ *In re M'Clean*, 6 John. Ch. 440.

satisfied me that, as far as such a person can have volition, she has it: she has simply desired that, if I think it right that the traverse should issue, I will allow it to proceed. I am, therefore, of opinion that this is a case in which, the traverse having been decided to be of right, I am bound to allow the traverse to go.

Before I part with this matter, there is one observation which I wish to make, though not bearing upon the point of law. This lady's property is of small amount, and without care and caution it will be swallowed up in litigation, and the person whom both sides are professing to protect, will, at the age of seventy-six, be stripped of her whole means of subsistence, and this by the operation of law brought in to protect her. Let the parties on both sides seriously consider this. Upon the present occasion eight counsel have appeared, three on the part of Mrs. Cumming, and five on the other side. I now make an order that no more costs shall be allowed than for two counsel on each side; and I will make an order that in whatever further steps are taken on either side, the expenditure shall be restricted to the lowest possible point, so as to preserve to this lady, if it is in the power of the Great Seal to do so, some remnant of her fortune for the remainder of her days.¹

THE LORD JUSTICE KNIGHT BRUCE. — The observations of the Lord Chancellor render almost or quite superfluous even the few words which I shall add.

An inquest under a commission of lunacy is, I apprehend, in theory a proceeding to which the alleged lunatic is not a party, and accordingly I apprehend the law to be that his rights, * 557 after the finding of the jury, are the * same, whether he shall have appeared before the jury for the purpose of contesting the allegation of lunacy, or not. If he has not contested the matter before the jury by himself, or any counsel, solicitor, or agent, on his behalf, and is not in default in not having done so (which I conceive to be the case), it would surely be in principle monstrous to say that he is not entitled as of right to dispute the finding, nor do I understand law and principle, or in other words law and justice, to differ in this respect. Legally, as I have said, his rights I believe to be the same, though he may have appeared and contested the matter before the jury, either in person or otherwise.

¹ See *In re M'Clean*, 6 John. Ch. 440.

The jurisdiction, therefore, to which it belongs to grant a traverse has, in my judgment, only to ascertain whether the application for it is the act of the free will of the person found lunatic, not whether the will is that of a person of sound or unsound mind. There being obviously many cases in which it is possible for a lunatic to have and express volition and state views as clearly as a sane man, and where, in the judgment of that jurisdiction, there is a plain and sufficient expression of free will, the traverse cannot, I think, be refused, however clearly, however importantly beneficial to the alleged lunatic it may, in the opinion of the Judge, be that the finding of the jury should remain unquestioned. It is the right of an English person to require that the free use of his property, and personal freedom, shall not be taken from him on the ground of alleged lunacy, without being allowed the opportunity of establishing his sanity or denying his insanity before a jury as a contesting party, not merely as a subject of inquiry. Whether in the present instance there has been such a plain and sufficient expression of free will as has been mentioned (though I consider it highly probable), I do not know, and of course therefore cannot join in deciding; it having been thought *by * 558 the Lord Chancellor, Lord CRANWORTH, and myself, right, that one alone, and that one the Lord Chancellor, should see and converse with Mrs. Cumming.

THE LORD JUSTICE LORD CRANWORTH. — I have only to express my entire concurrence in the judgment of the Lord Chancellor and my learned brother, and to add a few words to what has been said.

I think that, under the Statute of Edw. 6, the aggrieved party by an inquest which has found her a lunatic has a right to traverse. I think the right is expressly given to her by the statute. Independently of the authorities, this would have appeared to me perfectly clear and indisputable. Now, when I say that there is a right to traverse, I do not consider this right inconsistent with the fact that the Chancellor in some degree exercises a discretion. I conceive that to be merely a discretion to see that the party is herself really applying for the traverse, because the peculiar nature of the subject-matter of inquiry makes any analogy from ordinary cases to a great extent inapplicable. If a person sues out a writ to recover land or other property, it is presumed that it is his act;

but where there is a *prima facie* reason for supposing him incapable of having any will, it is fit that some precaution should be adopted for the purpose of seeing that that which is to be done as the exercise of his will is really so done. That is ordinarily done by the Lord Chancellor examining the person himself.¹ I do not, however, mean to say that there might not be cases in which, even without a personal examination, some inquiry might be taken and made on the subject; as, for instance, suppose a person is in a state, not of mental but of bodily illness, that makes it impossible he should be seen by the Chancellor.

* 559 * I do not say that a case might not occur in which some discretion might be exercised, but in the general observations which have been made I entirely concur, and I have added these few words lest it should be supposed that I entertain some doubt when really I entertain none.

Mr. Bethell then asked that the order should extend to stay all further proceedings under the commission.

THE LORD CHANCELLOR, however, said that this was a matter not then in question, and must be the subject of a distinct application.

The following is the order which was drawn up in pursuance of the foregoing decision:—

“Whereas the above-named Catherine Cumming did, on the 28th day of January last, prefer her petition in the said matter, stating as therein is stated, and praying, &c. Whereupon all parties concerned were ordered to attend on the matter of the said petition on the then next day of petitions, whereof notice was to be given forthwith, and a *caveat* having been entered against any proceedings in this matter without notice to John Turner, solicitor for Thomasine Catherine Hooper and Catherine Elizabeth Ince, the children and only next of kin of the said Catherine Cumming, notice of the said petition was directed to be given to the said John Turner, and the said petition having come on to be heard before the Lords Justices on the 11th day of February last, and having stood over and having been specially appointed for hearing

¹ *In re Hanks*, 3 John. Ch. 567.

before us, upon the question whether or not the said Catherine Cumming was entitled as of right to traverse the aforesaid inquisition, and coming on to be heard accordingly on Wednesday, the 17th day of March instant, and again on this day, *in * 560 the presence of *Mr. Bethell, Mr. Roundell Palmer, and Mr. Southgate*, of counsel for the said petitioner, and of *Mr. Attorney-General, Mr. Rolt, Sir William Page Wood, Mr. Petersdorff, and Mr. Morris*, of counsel for Benjamin Baily Hooper and Thomasine Catherine his wife, and John Ince and Catherine Elizabeth his wife: Now, upon hearing the said petition read, and what was alleged by the counsel aforesaid, and the said Catherine Cumming having, in pursuance of the Lord Chancellor's order in this behalf, personally attended him and been examined by him as to her wish to traverse the aforesaid inquisition, and having expressed her wish so to do, and it appearing to him upon such examination that the said Catherine Cumming was mentally competent to form and express such wish as aforesaid, we do think fit to and do hereby declare that, under the circumstances aforesaid, the said Catherine Cumming is entitled as of right to traverse the aforesaid inquisition; and we do hereby order that she be at liberty to traverse the same accordingly: And we do hereby further order that the traverse be tried before a jury of the county of Middlesex, of whom not fewer than nine members shall be selected from the special jury panel, within six calendar months from the date of this order, and be returned within one month after trial: And we do hereby further order that in case any taxation of costs in this matter shall be hereafter ordered, no more than two counsel on each side be allowed for on the hearing of this petition; and that this order be without prejudice to the Lord Chancellor directing, if he shall think fit, the allowance on any such taxation as aforesaid, of costs of any affidavit filed upon this petition: (a) And we do hereby further order that so much * of * 561 the said petition as prays for stay of proceedings in this matter do stand over."

April 2. Before the LORDS JUSTICES.

On this day so much of the petition as was undisposed of came

(a) This direction as to the costs of affidavits was inserted, as it appeared that one or two short affidavits had been filed in support of the petition, though not referred to on the hearing.

on to be heard, together with a petition of the next of kin (who were also the co-heiresses at law) of Mrs. Cumming, praying the confirmation of a report of the Master, approving of Miss Louisa Baker to be the committee of the person, and Mr. James Sharp to be the committee of the estate of Mrs. Cumming. This petition also prayed for taxation and payment out of the lunatic's estate, of the costs of the original application for a commission and of the proceedings thereon.

Mr. Bethell, Mr. R. Palmer, and Mr. Southgate, for Mrs. Cumming. — Before the passing of the Act 6 Geo. 4, c. 53, the stay of proceedings pending the traverse would have been a matter of course. Now, the statute was passed to supply a deficiency in the jurisdiction of the Court, and not for the purpose of making it imperative upon the Court to proceed in every case as if the inquisition was not the subject of a traverse, and as if the validity of the commission was free from doubt.

Every consideration for the comfort of the alleged lunatic in this case, is opposed to any change in her establishment. The result of appointing the committee who has been approved of, would be to produce irritation, and by surrounding Mrs. Cumming with the friends of those who sued out the commission, and excluding her from the access of those in whom she places confidence, will deprive her of the means of fairly and properly contesting the validity of the proceedings. It is not pretended

that the lady who now resides with Mrs. Cumming, is not
 * 562 a fit person in every respect, and it is most * important
 that there should be no unnecessary interference with the existing state of things. There is nothing in the nature of the property to require the immediate appointment of a committee of the estate. Each case must in this respect depend upon its own circumstances, and the evidence here shows that, if the proceedings are not suspended, there will be danger of a failure of justice, as well as of most injurious results to the health and comfort of Mrs. Cumming.

Sir W. P. Wood and Mr. Morris, for the next of kin. — The lunatic has not been served with the petition for the confirmation of the report, and she is not entitled to appear or to be heard upon that petition. Unless the payment of costs is directed as

prayed by it, the same difficulty would occur as arose in *Re Loveday* (a) if the traverse should be successful, and the Court will be unable to give costs, however much it may desire to do so for the sake of justice. With regard to the grant of the custody, we only seek to place it in safe hands, pending the traverse. The finding of the jury has at all events reversed the situations of the parties as regards the burden of proof. As the commission is at present undisturbed, the fact of the lunacy must be assumed, and all the usual proceedings must go on, unless some good cause is shown for interfering with them.

Mr. R. Palmer replied.

THE LORD JUSTICE KNIGHT BRUCE. — We are of opinion that the benefit of Mrs. Cumming will be best consulted by interfering not at all, or as little as possible, with the system of personal care of her which exists at present. But no sufficient reason has been shown why committees should not be appointed, or why * the grant should not take place, care being taken that the * 563 income of the property shall be received by her as if the grant were not made, and that the present system or personal care shall not be interfered with till further order. We think that the petition should stand over so far as relates to costs.

The Lord Justice Lord CRANWORTH concurred.

The following were the terms of the order : —

“Whereas the said Catherine Cumming did, on the 28th day of January last, prefer her petition, whereby she prayed,” &c. “And whereas the said petition having come on to be heard,” &c. “And whereas Benjamin Bailey Hooper, and Thomasine Catherine his wife, and John Ince, and Catherine Elizabeth his wife, did, on the 4th day of February last, prefer their petition,” &c., “whereupon all parties,” &c. “And the said petition, and so much of the petition of the said Catherine Cumming as was ordered to stand over as aforesaid coming on to be heard before us on this day, in the presence of *Sir William Page Wood* and *Mr. Morris*, of counsel for the said Benjamin Bailey Hooper and Thomasine

(a) *Ante*, p. 275.

Catherine his wife, and John Ince and Catherine Elizabeth his wife, and of *Mr. Bethell*, *Mr. Roundell Palmer*, and *Mr. Southgate*, of counsel for the said Catherine Cumming, now upon hearing the said petitions and the said report read, and what was alleged by the counsel aforesaid, we do think fit, and hereby order that the said report be confirmed: and we do hereby further order that the custody of the person of the said Catherine Cumming be granted to the said Louisa Baker, and the care and management of the estate of the said Catherine Cumming to the said James

Sharp respectively, for the time to come until further
* 564 * order, he, the said James Sharp, first giving such security as her Majesty's Attorney-General," &c. [Here followed the usual directions.] "And after the said Masters or Master shall in that case have made their or his report, such further order shall be made as shall be just. And we do hereby further order that the clear yearly income of the estate of the said Catherine Cumming as and when the same shall be received by the said James Sharp as committee of the estate be paid by him to the said Catherine Cumming until further order, and that such payment be allowed him on passing his account in this matter. And we do think fit, and hereby further order, that the system of personal care of the said Catherine Cumming established by and now subsisting under the orders in this matter dated respectively the 20th day of November, 1851, and the 22d day of December, 1851, be not in any way interfered with by the said Louisa Baker as the committee of the person or otherwise, and be continued until further order, excepting that Sarah Wonham, the nurse from Effra Hall Asylum, be discharged. And we do hereby further order that the rest of the matters prayed by the said secondly mentioned petition do stand over."

* In the Matter of the OXFORD AND WORCESTER * 565
EXTENSION AND CHESTER JUNCTION RAIL-
WAY WITH BRANCHES TO SHREWSBURY AND
NORTHWICH COMPANY, and of the JOINT-STOCK
COMPANIES WINDING-UP ACTS, 1848 and 1849.

SHARP and JAMES'S CASE.

1852. April 15, 21. Before the Lord Chancellor Lord ST. LEONARDS.

A. B. and C. D. were members of the managing committee of a provisionally registered railway company, and as such had allotted to them and accepted one hundred shares in the company: at a meeting of the managing committee, an instruction was given for the allotment of shares according to a scheme by which five hundred shares were reserved to each member of the managing committee: a report was made by the secretary of the company at a subsequent meeting, at which A. B. and C. D. were both present, that shares had been allotted according to the scheme; but no further evidence appeared of allotment of shares to, or acceptance of shares by the members of the committee. A. B. and C. D. subsequently executed the parliamentary contract in respect of one hundred shares only. *Held*, on the winding-up of the company, that the liability of A. B. and C. D. as contributories was limited to the one hundred shares, and was not affected by the proposed reservation of the five hundred shares.¹

On the winding-up of the above company, under an order dated the 4th May, 1849, the Master held Major Henry Jelf Sharp and Mr. John James liable as contributories for four hundred shares, such shares being in addition to one hundred shares for which each of these parties had executed the company's deed.

From this decision Major Sharp and Mr. James obtained permission to appeal directly to the Lord Chancellor, in consequence of the Vice-Chancellor KNIGHT BRUCE having, in the matter of this company, and in reference to the case of Mr. Peter Morrison, who was in a precisely similar position to that of the present appellants, * made an order to the same effect as that now * 566 sought to be reversed (a).

(a) See 15 Jur. 346.

¹ See 2 Lindley Partn. (Eng. ed. 1860) 1113 *et seq.*, 1119 *et seq.*; Carmichael's Case, 17 Sim. 163; Conway's Case, 5 De G. & S. 150; *Ex parte* Roberts, 1 Drew. 204; Mainwaring's Case, 2 De G., M. & G. 66; Roberts's Case, 3 De G. & S. 205; Cox's Case and Naylor's Case, 4 K. & J. 308, 314; *Ex parte* Besley, 2 M'N. & G. 176; Norbury's Case, 5 De G. & S. 423; Pearson's Ex'rs' Case, 3 De G., M. & G. 241.

The company was formed in the year 1845; the plan was subsequently extended, and both schemes were provisionally registered, in pursuance of the Act 7 & 8 Vict. c. 110. In November, 1846, the undertaking was abandoned, and the company dissolved by the votes of the shareholders, in pursuance of the Act 9 & 10 Vict. c. 28, in consequence of a sufficient portion of the capital not having been subscribed for or deposited, or the necessary sections and plans lodged, prior to the session of 1846, in conformity with the standing orders of Parliament. The following are the circumstances under which the question of the liability of the appellants arose.

Major Sharp and Mr. James were members of the provisional committee, and of the managing committee: there was also an allotment committee, apparently to superintend the allotment of shares, but of this committee they were not members. At a meeting of the managing committee, early in September, 1845, at which neither Major Sharp nor Mr. James was present, it was resolved that two hundred and fifty shares should be offered to each member of the provisional committee, and that the secretary should write to each member, requesting him to state, on or before the 24th September, whether he would take that or any less number, and that two hundred and fifty shares in addition should be offered to each member of the managing committee. In consequence, as it would appear, of there being a considerable demand for the shares of the company, a resolution was come to at a meeting of the managing committee on the 30th

September, at which Mr. James was present, that the secretary * 567 should send letters of allotment to the provisional committee of one hundred shares only for the present, accompanying the letter with an intimation that that number was part of the two hundred and fifty offered them by the managing committee, and that it was the intention of the committee to reserve the remainder.

On the 7th October, 1845, at another meeting of the managing committee, Mr. James being present, the following resolution was passed in reference to the previous resolution: "That the secretary do accompany the letter of allotment with a communication to the effect that if, when the committee of management shall have finally completed their arrangements, they shall find themselves in a position to adhere to their original intention of appor-

tioning to each member of the provisional committee two hundred and fifty shares, they will be happy to make up that number."

On the 10th October, 1845, another meeting of the managing committee was held, and at this meeting the following resolution, to which were affixed the initials of Mr. James and two other members of the committee, was passed: "*Resolved*, that the Committee of allotment be requested to make the allotment in accordance with the accompanying scheme, and that the capital of the company be reduced to 100,000 shares in accordance therewith."

The following was the scheme thus referred to:—

| | |
|--|----------------|
| Proposed that the number of shares | 112,000 |
| Be reduced | 12,000 |
| Leaving for capital | <u>100,000</u> |

* Of these to be issued to
107 provisional committee less
16 managing committee

* 568

| | |
|-----------------------------------|--------------|
| 91 at 100 each | 9,100 |
| To the public | 30,900 |
| Mr. Jackson and friends | <u>5,000</u> |

Shares 45,000 at £2. 2s. . . £94,500

Deduct estimated expenses, engineer, law, clerks, &c. 10,000

Balance of funds £84,500

Reserves. Shares.

Sixteen managing committee at 500 8,000

Provisional committee 150 13,650

Promoters 3,000

24,650

Above specified. 45,000

Reserve 30,350

100,000

| | | | |
|--------------|---|---|-------------------|
| Of the above | { directors 8,000 4,000 and P. C. 13,650 } | { 17,650 to be paid for previously to meet- ing of Parliament } | £37,065 |
|--------------|---|---|-------------------|

| | | | |
|-----------------------------------|---|-----------------------------|----------|
| Which will leave 4,000 | { | 10,000 at £3. 2s. — £31,000 | £121,565 |
| for directors and 30,350 reserve. | | | 31,000 |

Capital for Parliament £152,565

On the 21st October, at a meeting of the managing committee, at which Major Sharp and Mr. James were both present, the minutes of the former meeting were read and confirmed, and the secretary of the company reported that the allotment committee had completed the allotment of shares, and in doing so had carried out the views of the managing committee as conveyed to them at the last meeting. The shares allotted by the allotment committee were entered in a book called the allotment book; and in that book the names of Major Sharp and Mr. James appeared as allottees of one hundred shares each, and no more.

* 569 * At a subsequent meeting of the managing committee, held on the 9th December, 1845, at which Mr. James was present, it was resolved that the directors should be requested without delay to execute the parliamentary contract and subscribers' agreement in respect of the one hundred shares allotted to them; and it was also on the same day resolved that, under the depressed state of the money-market, and the consequent defalcation in the payment of deposits, the further prosecution of the company should be postponed.

The deed was accordingly signed by Major Sharp and Mr. James for one hundred shares each, on which they paid respectively the requisite deposits and received the usual scrip certificates. There was no evidence of the allotment of any other shares to the managing committee than that above stated. The Master, however, held Major Sharp and Mr. James to be liable as contributories for five hundred shares each; and to be relieved to the extent of four hundred shares was the object of the present appeal.

Mr. Daniel and *Mr. Terrell* for the appellants.—They submitted that the company had never gone so far as to create a liability in any one, except the parties who actually executed the deed; that the scheme of the 10th October, 1845, was inchoate only, and was not a completed transaction, and that the only measure of liability was the number of shares for which the deed was executed.

Mr. R. Palmer and *Mr. Cairns*, for the official manager.—They contended that the position of the appellants was such in regard to the company, that they must be held as having assented

* 570 to the scheme allotting to each * of them, as members of

the managing committee, five hundred shares, and that they were bound by it accordingly.

Mr. Daniel replied.

[The following cases were cited and commented on in the course of the argument: *Hutton v. Upfill*, (a) *Ex parte Davis's Executors*, (b) *Ex parte Barber*, (c) *Ex parte Morrison*. (d)]

[THE LORD CHANCELLOR complained that the manner in which the case was brought before the Court, rendered it nearly impossible to ascertain the real facts. His Lordship observed, that it would be very desirable and prevent much embarrassment, if in these cases a state of facts could be agreed on and signed by counsel, as that on which the decision of the Court was to proceed.]

April 21.

THE LORD CHANCELLOR commenced his judgment by again alluding to the difficulty he had had in ascertaining the real facts of the case, from the manner in which the materials were brought before the Court. His Lordship next stated the several facts in substance as above set out, and then proceeded to the following effect:—

As far as relates to the scheme of the 10th October, it is impossible, I think, to say that there was an absolute and binding contract on the parties to take the shares: it was a mere proposal, which was not acted on. The resolution is, that the committee of allotment be requested to make the allotment in accordance with the scheme: this was not done, and I do not find that the allotment of five hundred shares was ever actually made, *although there is a statement by the secretary that the *571 committee of allotment had completed the allotment. Then, as soon as matters began to wear an unfavourable aspect, a resolution was come to by the managing committee, that the directors should be requested to execute the parliamentary contract and subscribers' agreement for one hundred shares each; and Major

(a) 2 H. L. Cas. 674.

(b) Law Times, Vol. 15, p. 541.

(c) 20 Law J. Ch. 146; [15 Jur. 346. This case is said to be in effect overruled by *Sharp and James's Case*; 2 Lindley Partn. (Eng. ed. 1860) 1120].

(d) 20 Law J. Ch. 296; 15 Jur. 346.

Sharp and Mr. James executed the deeds accordingly, in respect of the one hundred shares originally allotted to them: beyond this there is no proof that any shares were allotted to these parties or accepted by them.

It is now, however, contended that they are liable for the four hundred shares in addition; and a case which occurred in this company, of Mr. Morrison, a gentleman similarly circumstanced with these parties, is referred to, in which the Vice-Chancellor KNIGHT BRUCE held him liable for the whole number of shares reserved to him. His Honor appears to have proceeded on the authority of *Hutton v. Upfill*; (a) and without saying what I think of that case, which it is unnecessary for me to do on the present occasion, I may observe that it was there held that there was not only an offer but also an acceptance of shares, while here there was no acceptance: it appears likewise by the report, that there were other circumstances, independently of his being a committee-man and accepting shares, that rendered Mr. Upfill liable as a contributory: the committee were there authorized to carry on the concern and to incur expense before the Act of Parliament was obtained; and a man making himself a party to such a course of dealing as that, could not be heard to say that he was not bound to contribute to liabilities so incurred.

In the present case, however, I am of opinion as to
 * 572 * each of the two gentlemen, that having been offered to him and having accepted only one hundred shares out of the five hundred which were within the scope of the scheme, and having executed the subscription deed and parliamentary contract in respect of one hundred shares only, his liability must be limited accordingly. I shall therefore order their names to be struck off the list as to all the shares, except the one hundred; and I shall make no order as to the costs of this appeal.¹

(a) 2 H. L. Cas. 674.

¹ See 2 Lindley Partn. (Eng. ed. 1860) 1145, 1146.

EVANS v. PROTHERO.

1852. April 16. Before the Lord Chancellor Lord St. LEONARDS.

A document containing all the requisites to make it a valid contract, and purporting to be a receipt, though by reason of its being insufficiently stamped inadmissible as such, may be received as evidence of the contract.¹

THIS was an appeal motion on the part of the defendants, Henry Prothero and Thomas Richards, from an order of the Vice-Chancellor KNIGHT BRUCE, dated the 11th January, 1851, refusing a fourth new trial of certain issues directed by the Vice-Chancellor WIGRAM on the 9th April, 1848: the issues were, first, whether an agreement had been entered into by and between one Evan Richards, and his brother Jenkin Richards, for the purchase of premises situate in the parish of Merthyr Tydvil, in the county of Glamorgan; and, secondly, whether the purchase-money was paid in pursuance of this agreement.

At the trial of the issues at Cardiff, on the 15th July, 1848, the plaintiff produced the following document purporting to be a receipt for the consideration money for the premises in question:—

“Recd. this 25th August, 1827, of Mr. Jenkin Richards now and before the sum of twenty-one pounds, being the amount of the purchase of three tenements sold * by me adjoining * 573 the river Taaffe: Received the contents. Witness, John Swaine—Evan Richards+.”

This document was originally impressed with a sixpenny stamp; but when produced before the jury, it had an additional stamp of one pound. The Judge refused to receive it in evidence: the jury nevertheless found in favour of the plaintiff on both issues. The Vice-Chancellor WIGRAM having refused a new trial of the issues, the same was granted by Lord COTTENHAM, on the 16th March, 1849, who held that no evidence of the agreement and purchase had been produced.

On occasion of the second trial, which took place at Cardiff on the 16th and 17th August, 1849, the document was again ten-

¹ See *Diplock v. Hammond*, 5 De G., M. & G. 320; *Evans v. Prothero*, 2 M’N. & G. 319, and cases in notes.

dered as evidence, and, though its reception was objected to by the defendants, was admitted by Mr. Baron PLATT; and the jury gave a verdict in favour of the plaintiff on both issues. The defendants then applied, for the second time, to the Vice-Chancellor WIGRAM for a new trial, which was refused by his Honor as to the first issue, but granted as to the second. The defendants then appealed to the Lord Chancellor, Lord COTTENHAM, who, after taking time to consider, held that the document ought not to have been received, inasmuch as the jury must have been influenced by the reception of that document, and therefore felt himself compelled to send the issues to another trial. (a)

The issues were accordingly sent down for a third trial; and on the occasion of that third trial in July, 1850, the plaintiff's counsel having tendered and read the document to the jury, an objection to its reception as evidence was allowed by Mr. Baron * 574 PARKE, but the * jury again returned a verdict in favour of the plaintiff on both issues. The defendants then made the application to the Vice-Chancellor KNIGHT BRUCE for a fourth new trial, and, in consequence of his Honor refusing that motion, now appealed to the Lord Chancellor.

Mr. Walker and Mr. Pulling for the defendants, in support of the appeal motion. — The document, being inadmissible as a receipt, was inadmissible for any other purpose. The fact that it was read before the jury, though the objection to its reception was sustained, nevertheless prejudiced their minds and induced them to return a perverse verdict, directly opposed to the summing up of the presiding Judge. The case of *Matheson v. Ross*, (b) on which the plaintiff relied against a new trial of these issues, was on the former motion in this suit explained by Lord COTTENHAM to be clearly distinguishable from the present, inasmuch as in that case the document purported to be a statement and settlement of accounts, and was quite unconnected with the fact whether the balance had been paid or not, which was not in question in the case. The opinions of Mr. Justice WIGHTMAN, Sir J. WIGRAM, Baron PARKE, and Lord COTTENHAM, are unanimous against the admissibility of the document: and we contend, that to have been admissible at all, it ought to have been stamped according to its legal character.

(a) 2 Mac. & G. 319.

(b) 2 H. L. Cas. 286.

Beeching v. Westbrook, (a) Hawkins v. Warre, (b) Jones v. Ryder, (c) Doe v. Stagg, (d) Corder v. Drakeford. (e)

Mr. W. M. James, for the plaintiff, was not called upon.

* THE LORD CHANCELLOR, after stating the facts of the * 575 case, and reading the document purporting to be the receipt, proceeded to the following effect:—

It appears to me to possess all the requisites to constitute it valid evidence of an agreement; for it contains the names of the parties who are the buyer and the seller, and it distinctly specifies both the property and the consideration money for that property. The whole of this litigation turns on the fact of the document having originally been impressed only with a sixpenny stamp; and it was contended before me that the document had been virtually admitted, and that the minds of the jury had been warped. There is, however, no ground for such an assertion; because, while there was no obligation on the part of the plaintiff not to tender the document, the learned Judge who tried the issues on the last occasion in fact rejected it.

Now the question being, first, whether there was any binding contract at all between the parties, and, secondly, whether there was any money paid, and the object of the investigation being simply to elicit truth, I confess I entertain no doubt, with all deference to the opinions which have been attributed to the learned Judges before whom the case has already come, that the document in question was receivable as evidence of an agreement, though, by reason of the fiscal regulations of the country, not as evidence of a receipt. Under these circumstances I think the jury arrived at the conclusion which I believe to be in accordance with the merits and justice of the case; and I am satisfied that I am exercising a sound discretion in refusing this motion with costs.

(a) 8 M. & W. 411.

(d) 7 Scott, 690.

(b) 3 B. & C. 690.

(e) 3 Taunt. 382.

(c) 4 M. & W. 32.

* 576 * In the Matter of the NORTH OF ENGLAND JOINT-STOCK BANKING COMPANY, and of the JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849.

STRAFFON'S EXECUTORS' CASE.

1852. March 31. April 15, 21. Before the Lord Chancellor Lord ST. LEONARDS.

In deciding whether a party is or is not a contributory within the meaning of the Joint-stock Companies Winding-up Acts, the point to be ascertained is, whether he is liable in any manner whatsoever to contribute to the debts, liabilities, and losses of the company; and it is not necessary that he should be a member of the company according to the strict provisions of the deed of settlement.

If directors, not following the formalities prescribed by the deed of settlement, adopt in respect of a particular transaction and for the purpose of constituting shareholders a new rule of proceeding, and a party treats himself and is treated by the directors as a shareholder by virtue of such a transaction, it is not competent either to the party or the directors subsequently to repudiate the transaction on the ground of non-compliance with the formalities required by the deed of settlement.¹

A. B. became the owner of shares in a joint-stock company by transfer from former holders, and treated himself and was treated by the directors as a shareholder: all the formalities of the deed of settlement were not, however, observed in the transaction. *Held*, nevertheless, that every matter of substance having been complied with, the executors of A. B. were properly placed on the list of contributories in respect of the shares, on the winding up of the company.²

¹ For other cases, showing that where a person has acted, and been treated as a shareholder, he will be treated as a contributory, notwithstanding the non-observance of those formalities which, according to the strict letter of the company's deed, must be complied with before a person is entitled to share profits, or enjoy the other rights or privileges of a shareholder; see *Maguire's Case*, 3 De G. & S. 31; *Sanderson's Case*, 3 De G. & S. 66; 3 H. L. Cas. 698; *Gordon's Case*, 3 De G. & S. 249; *Walter's Case*, 3 De G. & S. 149; 19 L. J. Ch. 501; *Mayhew's Case*, 5 De G., M. & G. 837; *Heward v. Wheatley*, 3 De G., M. & G. 628; *Robinson's Executor's Case*, 15 Jur. 438; 2 De G., M. & G. 517; 6 De G., M. & G. 572; *Luard's Case*, 1 De G., F. & J. 533; *Bunn's Case*, 2 De G., F. & J. 275; *Meux's Ex. Case*, 2 De G., M. & G. 522; *Bernard's Case*, 5 De G. & S. 283; *Barton's Case*, 4 Drew. 535; 5 Jur. N. S. 420; *Hitchcock's Case*, 3 De G. & Sm. 92; *Richmond's Case*, 4 K. & J. 305; *Barclay's Case*, 26 Beav. 177; *Ex parte Worth*, 4 Drew. 529; 1 Lindley Partn. (Eng. ed. 1860) 102-105, 2 *ib.* 677, 1087 *et seq.*, 1125, 1126; *Ex parte Brown*, 19 Beav. 97; *Ex parte Bennett*, 18 Beav. 339.

² See *Hall's Case*, 1 M'N. & G. 307 and cases in note (1); 2 Lindley Partn. (Eng. ed. 1860) 1095.

If a man is bound to execute a deed containing particular covenants, and by the desire of those who have a right to call on him to execute that deed he executes another deed containing a covenant that he will obey, observe, and perform all the covenants in the principal deed, he becomes bound by the principal deed.¹

THIS was an appeal by Henry Nelson and Jonathan Reaveley, the executors of the will of John Straffon deceased, from an order of the Vice-Chancellor KNIGHT BRUCE, placing their names on the list of contributories of the above company for one hundred and twenty shares, and directing a reference to the Master as to the terms and nature of the contract under which five hundred and eighty additional shares had been taken by the testator.

The business of the company, which was formed in 1832, was professedly carried on upon the terms and conditions and subject to the rules and regulations contained * in a printed * 577 deed of settlement, dated the 14th November, 1832, of which the following were the articles having especial reference to the matter of the present appeal :—

No. 22. "The directors shall once in every half-year set a value upon the shares, and such value shall, for the purposes of these presents, be deemed the true and actual value thereof for the time being; and no shares shall be sold or transferred until after the first half-yearly meeting in the year 1833, but after that period it shall be lawful for the shareholders, or their respective executors, administrators, or assigns, with the consent of the directors, to sell or transfer their respective shares, such consent to be testified by the managing directors signing their names in the margin of the instrument of transfer; and for the purpose of obtaining such consent, the holder of the shares proposed to be transferred shall give notice in writing to the directors, to be left with the manager at the banking-house in Newcastle-upon Tyne, of the proposed transfer, and which notice shall contain the respective names and address of such holder and the proposed transferee: *Provided always*, that before any shares shall be sold the same shall be first offered to the directors on behalf of the company at the lowest price the holder thereof shall agree to take for the same: *Provided also*, in case the directors shall refuse their consent to any transfer of shares, they shall, on the

¹ See *Hay v. Willoughby*, 10 Hare, 242.

request of the holder thereof, be obliged to purchase the same out of the funds and on behalf of the company at the value thereof for the time being set upon them as aforesaid."

No. 24. "The directors shall have power, from time to time, to make such regulations respecting the form, preparation, custody, and registration of the instrument of transfer of shares as * 578 shall appear to them expedient, * and all sales and transfers of any shares not made conformably to the provisions of the deed of settlement, and according to the regulations of the directors, shall be invalid at law and in equity, and every purchaser or transferee of shares shall in respect thereof, if required by the directors either expressly or by a general regulation in that behalf, execute a deed, to be prepared for the purpose by the directors, whereby he may enter into covenants with the trustees or the public officers of the company, duly to observe and abide by all the stipulations, provisions, and regulations for the time being affecting or intended to affect holders of shares in this company, provided that the fees paid to the officers of the company for preparing, registering, and perfecting every such transfer shall not exceed 1s. per share on the shares transferred, exclusive of stamp duties."

No. 25. "The directors are hereby authorized to purchase any shares for the benefit of the company, and whenever, by means of any purchase made or forfeiture accrued pursuant to the provisions of the deed of settlement, any shares shall have become vested in the directors on behalf of the company, they, the directors, may either retain such shares on behalf of the company, or, at their discretion, and at any time or times, and either by public auction or private contract, or otherwise, as to the directors shall seem most expedient, and without the concurrence of the former owner or holder thereof or his representatives, sell and dispose of the same shares for the best price in money that can be obtained for the same, or otherwise deal therewith as to them shall seem most expedient and for the benefit of the company, and the proceeds arising from any such sale or disposition shall be added to the capital of the company. Every purchaser of such shares shall when and so soon as he shall have paid his purchase- * 579 money * to the directors, and otherwise have complied with the provisions of the deed of settlement respecting purchasers of shares, or such of them as may be applicable to the

case now in contemplation, receive from the directors a certificate or transfer of the same shares under the hands of two of their body, and be thereupon recognized as a shareholder in respect of the same shares and invested with all the rights, privileges, and qualifications incident to the complete ownership of such shares."

No. 32. "Every person to whom shares shall be transferred and who shall not then be a member of the company and subject to the provisions of the deed of settlement in respect of any other shares, and every person who, being the husband of any female shareholder or the executor, administrator, or legatee of any deceased shareholder as aforesaid, shall by notice in writing as aforesaid signify to the directors his desire to become a member of the company in respect of the shares vested in him in such capacity, and shall not at the time of the said shares becoming vested in him by the means aforesaid be a member of the company and subject as last aforesaid in respect of any other shares, shall, as to all duties, obligations, claims, and demands upon or against him in respect of such shares, be considered a member of the company from the time of the same shares being so transferred to or so becoming vested in him as aforesaid; but as to all profits, rights, privileges, benefits, and advantages to arise from the same shares, no such person shall be considered as a member in respect of the same until he shall have executed the deed of settlement."

No. 33. "Every person in whom any shares shall vest by transfer or otherwise, and who previously to such vesting shall have executed the deed of settlement, * and who shall be a * 580 member of the company to all purposes in respect of any other shares, shall, as to all the shares so vesting in him as aforesaid, be considered as a member from the date of the transfer to him, or from the time of leaving his title to such shares in the banking-house of the company, or proving it as aforesaid, and shall not be required, nor shall it be necessary for him again to execute the deed of settlement."

The following statement will show the manner in which the testator became possessed of the whole seven hundred shares in reference to which the present question arose.

On the 9th October, 1844, Mary Unthank, Caleb Richardson, and William Richardson, the executors of George Unthank, gave notice to the directors that they had agreed to sell and proposed

to transfer to John Straffon, a parcel of forty shares at the price of 4*l.* per share; and on the same day, and in pursuance of the twenty-second article of the company's deed, they offered these shares to the directors at that price: on the same day they pursued a similar course in reference to another parcel of eighty shares. The offers as to both parcels were declined, and the proposed transfers thus extending to one hundred and twenty shares were formally allowed by the directors at a meeting on the 18th October, 1844. The shares were thereupon sold, through a broker, to J. Straffon; and on the 25th October, 1844, the following deed was executed in reference to ten of these shares, such being apparently the method in which it was the practice of the directors to carry out the provisions of the thirty-second and thirty-third articles of the deed of settlement.

"This indenture of three parts, made the 26th day of October, in the year of our Lord 1844, between Mary Unthank, of
 * 581 North Shields, in the county * of Northumberland, and Caleb Richardson and William Richardson of Bishop Wearmouth in the county of Durham, executrix and executors of the late George Unthank of North Shields in the county of Northumberland of the first part, John Straffon of South Shields in the county of Durham, shipowner, of the second part, and George Burdis and David Flintoff of the town and county of Newcastle-upon-Tyne, public officers of the company or partnership called the North of England Joint-stock Banking Company, of the third part; witnesseth that the said M. Unthank, C. Richardson, and W. Richardson, in consideration of the sum of 40*l.* to them paid by the said J. Straffon upon or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, sold, assigned, and transferred, and by these presents do grant, sell, assign, and transfer, unto the said J. Straffon, his executors, administrators, and assigns, all those ten shares of them the said M. Unthank, C. Richardson, and W. Richardson of and in the capital stock of the said company now standing in their names in the books thereof, with all dividends, interest, profits, proceeds, benefits, and advantages incident to or arising from the said shares hereby assigned, to hold unto the said J. Straffon, his executors, administrators, and assigns from henceforth for ever, subject to the covenants, provisions, declarations, articles, stipulations, regulations, and agreements contained and to be contained in the present

or any future or supplemental subsisting deed of settlement of the said company: And the said John Straffon, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said M. Unthank, C. Richardson, and W. Richardson, their executors, and administrators, and with the said G. Burdis and D. Flintoff, their successors, executors, administrators, and assigns, that he, the * said J. Straffon, shall and will, * 582 from time to time and at all times hereafter, in respect of the said shares hereby assigned, well and truly pay all instalments and sums of money now due or hereafter to become due thereon, and also perform, fulfil, and keep all and every the covenants, stipulations, provisions, and regulations contained in the deed of settlement of the said company, bearing date the 14th day of November, 1832, and also all other stipulations, provisions, and regulations for the time being affecting or intended to affect holders of shares in the said company, and shall and will, if thereto required by the directors either expressly or by a general regulation in that behalf, execute a deed of covenant (to be prepared by the directors for that purpose) to and with the trustees or public officers of the company, on the part of him, the said J. Straffon, his executors, administrators, and assigns, duly to observe and abide by all the stipulations, provisions, and regulations for the time being affecting or intended to affect holders of shares in the said company: In witness whereof the said parties to these presents have hereunto set their hands and seals, the day and year first above written."

The names of all the parties to this deed appeared as signing the same, and the signatures were duly attested: it appeared, however, by the evidence of J. M. Stranghan, the grandson of J. Straffon, who was called as a witness before the Master, that the signature of J. Straffon was the handwriting of the grandson, and not that of J. Straffon; but it was also proved that J. M. Stranghan acted as the agent of J. Straffon, and had his verbal authority to sign documents generally for him. There was also evidence of the payment of the purchase-money for the whole one hundred and twenty shares; and it appeared that the certificates of the shares in the possession of the vendors were delivered up to the bank, and * new certificates, signed by G. Burdis, the man- * 583 aging director, delivered to J. Straffon. It was to this parcel of shares that the first part of the order appealed from related.

A further purchase of one hundred shares was subsequently made by J. Straffon from the directors of the company: it was proved by the usual broker's note dated the 16th November, 1844; and the notice of the proposed transfer was signed by the managing director, and appeared marked with the words, "Transferred, 4th Decr. 1844." J. Straffon then purchased fifty shares from J. W. White, in reference to which transaction there was in evidence the broker's note, the offer to and refusal of purchase by the directors, and the notice of and allowance of transfer by them: on the offer there was written the words, "Transferred, 3d March, 1845," followed by the signature of a director. Upon these shares, amounting to two hundred and seventy, a dividend was received by Mr. Stranghan on the 10th March, 1845, and carried to J. Straffon's account. J. Straffon then made two purchases of fifty shares and thirty shares, thus making a total of three hundred and fifty shares. On these a dividend was received on the 9th September, 1845, by J. Straffon, and he signed the dividend warrant himself. He then purchased other shares, to the number of three hundred and fifty; and on the 10th March, 1846, and 26th September, 1846, dividends were paid on the whole seven hundred shares. The dividend warrants on these two last occasions were signed in J. Straffon's name, by Alexander Stranghan. The evidence in reference to the several purchases of shares subsequent to the fifty shares bought of J. W. White was similar to the evidence relating to that transaction. There were also certificates

for the whole of the seven hundred shares (eleven in number) in the following form: "The North * of England Joint-stock Banking Company. Forty shares,—No. 3771 to 3800, 10,226 to 10,235. Newcastle-upon-Tyne.—This is to certify that John Straffon of South Shields, in the county of Durham, is a proprietor of forty shares in the capital stock of the North of England Joint-stock Banking Company, and that, as the proprietor of the said shares, he hath become entitled to all the benefits and emoluments thereof, upon the terms and stipulations contained in the deed of settlement of the company bearing date the 14th day of November, 1832, with power to transfer the same shares, subject to the restriction contained in the said deed regulating the transfer of shares. As witness my hand the 4th day of November, 1844. George Burdis, Managing Director. Registered, W. H. Robinson."

J. Straffon died in September, 1846; and the company stopped payment in March, 1847. It did not appear that the executors gave any notice to the company of the probate of the will, or that they received dividends or took any steps in reference to the shares. In the list of shareholders returned to the stamp office before the stoppage of the bank, and after the death of J. Straffon, the entry was "Straffon's, John, reprieve, South Shields, late shipowner;" and in the returns subsequent to the stoppage the names of the executors were inserted as executors.

Under these circumstances the Master settled the list of contributories as to the executors, by including their names in the list for seven hundred shares in the character of executors. From this decision they appealed to the Vice-Chancellor KNIGHT BRUCE, who, by an order made on the 10th March, 1851, confirmed the decision of the Master as to the one hundred and twenty shares bought from the executors of G. Unthank, and referred * it back as to the remaining five hundred and eighty shares * 585 to inquire what were the terms and nature of the contract as to those shares, with liberty to state special circumstances. From this order the executors of J. Straffon now appealed to the Lord Chancellor.

Mr. W. D. Lewis, with whom was *Mr. Bethell*, who was absent, for the appeal. — He referred to the several articles of the deed of settlement above set out, and contended that the regulations therein specified in reference to the transfer of shares had not been complied with in the case of the purchases by J. Straffon; in particular that J. Straffon had never signed the deed of settlement, that no regular transfer of shares had been executed except as to ten of the shares, and that the consent of the directors to the transfers had not been signified in the form required by the deed of settlement; that under these circumstances J. Straffon never became a member of the company. He also contended that the directors had no power to waive the observance of the regulations contained in the deed of settlement, and that, therefore, they had no right to issue the certificate above mentioned. He submitted that the circumstance of J. Straffon receiving the dividends, made no difference, there being no such thing known as a partnership in equity in distinction from a partnership at law; and that thus the case resolved itself into the question whether there had been

a binding agreement by the company to admit J. Straffon as a partner, which under the circumstances must be answered in the negative. He referred to *Ex parte Morgan*, (a) *Ex parte Hall*, (b) *Bosanquet v. Shortridge*, (c) *Sanderson's Case*, (d) *Dodgson's Case*. (e)

* 586 * *Mr. Bacon* and *Mr. J. V. Prior*, contra, and in support of the decision of the Vice-Chancellor. — They relied on the deed of transfer, the certificates issued by the directors, and the receipt of dividends, as clearly rendering J. Straffon liable to contribute as a shareholder in the company.

Mr. Bethell replied. — He enforced the argument addressed to the Court by *Mr. Lewis*, citing also *Ness v. Angas*, (g) *Ness v. Armstrong*, (h) *Jackson v. Cocker*, (i) *The Newry, &c., Railway Company v. Moss*, (k) *Lawes's Case*. (l)

Mr. J. V. Prior referred the Lord Chancellor to *Reaveley's Case*. (m)

April 21.

THE LORD CHANCELLOR. — This is an appeal from a decision of the Vice-Chancellor KNIGHT BRUCE, holding that *Mr. Straffon*, represented here by his executors, is answerable as a contributory on the winding up of this company to the extent of one hundred and twenty shares, and directing a reference to the Master, to inquire as to his liability in respect of five hundred and eighty shares, the residue of seven hundred shares; and having before me all the evidence which can be obtained in regard to any of the shares, I mean to dispose of the whole of the case, and to discharge so much of the order as directs the reference to the Master, thus leaving the executors on the list for the whole seven hundred shares.

* 587 * The question really being whether *Mr. Straffon* was or was not a contributory, the case has been argued before me to an extent that struck me as somewhat surprising. It was insisted that according to the Winding-up Act I had no power to

(a) 1 Mac. & G. 225.

(b) 1 Mac. & G. 307.

(c) 4 Exch. 699.

(d) 3 De G. & S. 66.

(e) 3 De G. & S. 85.

(g) 3 Exch. 805.

(h) 4 Exch. 21.

(i) 4 Beav. 59.

(k) 14 Beav. 64.

(l) *Ante*, p. 421.

(m) 1 De G. & S. 550; 1 H. & T. 118.

place any person on the list of contributories to the liabilities of this company, unless he was a perfect legal member of the company, according to the strict literal construction of the deed of settlement; that I was not at liberty to look out of that deed, but must examine the transactions by it; and that without considering what the equities might be between the parties, I was bound to regard only the legal remedy, and could not go beyond it. I consider, however, that such are not the rules by which I am to be guided in carrying the Act into execution.

The point to be ascertained being, who is a contributory according to the Act, the contention that no one can be a contributory who is not a legal member is in no respect consistent with the Act itself, the third section of which enacts that "the word 'member' shall mean any person entitled to a share of the assets or accruing profits of any such company at the time of presenting the petition for dissolving the same or winding up the affairs thereof under this Act;" and that "the word 'contributory' shall include every member of a company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof, whether as heir, devisee, executor, or administrator of a deceased member, or as a former member of the same, or as heir, devisee, executor, or administrator of a former member of the same deceased, or otherwise howsoever." The word "contributory" has thus a sense put upon it much larger than the word "member," a "member" being one * who is legally such in the proper sense of the term, but * 588 a contributory being one who is liable to contribute to the payment of the debts, liabilities, and losses of the company in anywise whatsoever. All, therefore, that I have to consider in deciding whether a man is or is not a contributory is, whether he is liable in any manner whatsoever to contribute to the debts, liabilities, and losses of the company. Again, the seventy-sixth section directs that the official manager shall make out a list of the members "and other contributories of such company," thus making it perfectly clear that without deciding exactly who is a contributory, which must depend on the special circumstances of each case, the word "contributory" has a much larger meaning than the word "member." This point was decided in the matter of this very company in *Reaveley's Case*, (a) and the decision was affirmed on

(a) 1 De G. & S. 550.

appeal, by the Lord Chancellor. In that case shares were purchased for an infant without disclosing his infancy, the vendor signing a certificate required by the company's rules that the purchaser was of age; it was discovered that the boy was under age, and the father entered into a deed with the company by which he covenanted to indemnify them from all losses which might be sustained by reason of his son having become a member during his infancy: the father was held to be liable as a contributory; he was in no sense a member of the company; but being liable indirectly to the losses, debts, and liabilities of the company, he was held to come within the term "contributory," and to be liable accordingly.

In reference to the cases which have been cited, — where there was no privity between the company and the party sought * 589 to be made liable as in *Ex parte Hall*, (a) *The Newry Railway Company v. Moss*, (b) and *Fenwick's Case*, (c) it is quite clear there could be no liability as a member, and if not liable as a member it must be shown that the party is otherwise liable to the losses and demands of the company. The cases are, however, altogether different from and do not touch the one before me. Another class of cases has been relied upon arising on the Statute 7 Geo. 4, c. 46; I refer to *Ness v. Angas*, (d) *Ness v. Armstrong*, (e) and *Bosanquet v. Shortridge*. (g) Those cases, however, are also distinguishable; they depend upon a particular Act of Parliament, which, though referring to equitable as well as legal liabilities, does not furnish any particular remedy for equitable liabilities: and therefore, a man cannot be proceeded against by a *scire facias* under the particular provisions of that Act, unless it can be shown that he is legally liable as a member. In *Bosanquet v. Shortridge*, (g) although no doubt a question might have been raised in reference to the way in which the business had been conducted, yet the directors, that is, the company, withheld their sanction to the transfer, such sanction being necessary to render it valid, and by so doing, and within a moderate time, really disclaimed the act. I think, therefore, that these cases stand on their own grounds, and in no respect apply to the case now under consideration.

(a) 1 Mac. & G. 307.

(b) 14 Beav. 64.

(c) 1 De G. & S. 557.

(d) 3 Exch. 805.

(e) 4 Exch. 21.

(g) 4 Exch. 699.

It must, however, be distinctly understood, that in deciding this case, I am not touching on any question like that raised in *Ex parte Morgan*; (a) I have followed that case since I sat here, and I acted on the same rule and in a similar manner in Ireland. I have no intention of laying down that directors can act in contravention of their powers, and as between themselves and the general body of the shareholders, can maintain an * act * 590 done in violation of their powers. That, however, is a totally different question from the one now raised, which is, whether if directors, not following the rules of their deed of settlement, adopt, in respect of particular transactions, a new rule, and hold out to the public that that new rule is binding, and if an individual advances his money on the faith of that rule, and is acknowledged as a shareholder, and admits and treats himself as bound by the informal transaction, whether in such a case both parties are not bound by the course of dealing, although the deed of settlement, in respect of formalities, has not been obeyed. There would be no safety for mankind in dealings of this nature, if it were to be held that every minute regulation which the directors themselves ought to obey, must be complied with in order to make a transaction binding as between them and a third party. The shareholders might call the directors to account for disregarding the formalities required, yet if they do not do so, and a course of action is adopted without complaint, which results in making a man a shareholder without going through all the prescribed formalities, a dealing of that kind may be perfectly good as between the party dealing with the directors and the directors themselves, so as to bind both of them.

Having made these general observations, I will now consider what the Acts of Parliament require, and how they bear on the facts of the case. I am, perhaps, taking more trouble than this case deserves from any importance that belongs to it; but I do so with a view of endeavouring to come to a right conclusion as to what the effect of the law really is, in order that it may, so far at least as my opinion goes, be understood on what grounds this Court proceeds in dealing with cases where there has been, as in the present instance, a variation from the strict rules of the deed of settlement.

* The twenty-second article of the deed of settlement * 591

(a) 1 Mac. & G. 225.

of this company gives leave to the shareholders, their respective executors, administrators, or assigns, with the consent of the directors, to sell or transfer their respective shares, "such consent to be testified by the managing directors signing their names in the margin of the instrument of transfer" (this form, it is said and truly said, has not been obeyed literally in this case); and it further directs that, for the purpose of obtaining such consent, the holder of the shares proposed to be transferred shall give notice in writing to the directors, to be left with the manager at the banking-house in Newcastle-upon-Tyne, of the proposed transfer, and which notice shall contain the respective names and addresses of such holder and the proposed transferee, and that before any shares shall be sold the same shall be offered to the directors at the lowest price; and in case they refuse to accede to any transfer of shares, they shall, on the request of the holder thereof, be obliged to purchase the same out of the funds, and on behalf of the company at the value thereof for the time being set upon them as aforesaid. Here, then, there are some things of form, and others which are of substance; and the latter, namely, that the party who wishes to sell shall give notice to the directors of his intention, of his own name and of the name of the proposed purchaser or transferee, that he shall offer them to the directors stating what the lowest sum is he is willing to take, the directors having a right to purchase at that sum, — have all been complied with in the present case; in every instance, the offer having been made and the directors having declined to purchase, the shares were transferred, and the word "transferred" was written across the offer of purchase, and signed by one or more directors; the directors' consent was, however, not testified by the managing directors signing their names in the margin of the instrument of transfer; but the question is whether this defect can in any way be supplied.

* 592 * [His Lordship here read the twenty-fourth, thirty-second, and thirty-third articles of the deed of settlement as above set out; and after referring to the thirty-fourth article, directing that on the transfer of shares the old certificates should be given up, and new certificates given, proceeded as follows: —]

There are two classes of shares to which the questions raised on
[456]

this appeal relate : the first, to which I have already alluded, consisted of one hundred and twenty shares, and as to these, all that was of substance in the regulations was performed. The way in which the transfer was managed in the purchase of these one hundred and twenty shares was this, and it appears by the evidence to have been a scheme adopted by the directors in order to save stamp duty, and to avoid the necessity of formal transfers. The twenty-fourth article having laid down that, if the directors required, a purchaser should execute a deed whereby he should enter into covenants with the trustees or the public officers of the company duly to observe the stipulations in the deed of settlement, and the thirty-third article having provided that members acquiring additional shares need not execute the deed of settlement, the deed which was actually executed in the present case was framed on these articles: it is made between the persons who were the holders of the shares of the first part; the purchaser, Mr. Straffon, of the second part; and the public officers of the company of the third part: it is a regular transfer of ten shares, and contains a covenant by the purchaser with the sellers, and with the public officers of the company, their successors, executors, administrators, and assigns, that he, the said J. Straffon, shall and will, from time to time and at all times thereafter, in respect of the shares thereby assigned well and truly pay all instalments and sums of money due or thereafter to become * due * 593 thereon, and also perform, fulfil, and keep all and every the covenants, stipulations, provisions, and regulations contained in the deed of settlement of the said company, and also all other stipulations, provisions, and regulations for the time being affecting or intending to affect holders of shares in the company; and shall and will, if thereto required by the directors either expressly or by a general regulation in that behalf, execute a deed of covenant (to be prepared by the directors for that purpose) to and with the trustees or public officers of the company, on the part of him the said J. Straffon, his executors, administrators, and assigns, duly to observe and abide by all the stipulations, provisions, and regulations for the time being affecting or intended to affect holders of shares in the said company. The last of these clauses was unnecessary, for this very deed was executing the obligation, and the purchaser thus covenants that he will do again the very act which he has just performed. This deed was executed regularly by the persons who

were the sellers, and also by the public officers of the company ; there was also a receipt for the purchase-money : Mr. Straffon's name, too, appears to it in very legible characters, " John Straffon," with an attestation by John M'Intosh Stranghan, a person who has made an affidavit in this matter. The deed was then sent to the company as a deed executed by the purchaser, and as such was accepted and dealt with by the company, without the slightest knowledge that it had not been really executed by Mr. Straffon ; and in consequence of it, Mr. Straffon receives dividends as a purchaser, and signs, either by himself or by his agent, the receipts for them and enters them regularly in a book in which among other things he keeps an account of his property in this company, discharging the debtor side by giving credit for the sums thus from time to time paid to him. I am, however, asked to treat

the deed as a nullity, because it turns out that a grandson * 594 of this gentleman signed it for him, * believing himself to be authorized to do so, and acting for him generally in his affairs, Mr. Straffon too having himself made the purchase and afterwards acted upon the deed so sent forth as his deed. But such is not the law of this Court ; and the doctrine of estoppel will apply to a case of this kind as well as to any other ; and if I had to decide the matter for the first time, I should hold, without the slightest difficulty, that Mr. Straffon could never be heard to say, against any person in the company, that that deed was not his deed. Mr. Straffon indeed never made any such statement ; and it is by his executors after his death that the contention is raised.

With regard to the law on the subject, without going into many cases, the point is perfectly settled in the case of *The London Grand Junction Railway Company v. Freeman*, (a) which shows that a valid and binding contract will be formed, even although there has been no real transfer, if there has been a course of dealing with the company in which they have permitted a scripholder to become a shareholder *de facto*, and that too, though it was known that the party was not an original scripholder, but stood in the place of another scripholder. In the case of *The Sheffield Ash-ton-under-Lyne and Manchester Railway Company v. Woodcock*, (b) a purchaser sent in a transfer which he knew to be void, there being a blank left for his name, and the consideration being

(a) 2 Railway Cases, 468.

(b) *Ib.* 522.

untruly stated ; he executed it, however, but subsequently attempted to set up its invalidity : he was held to be estopped from so doing, it being a rule of law that when one party makes a representation to another by which the position of the latter is altered, the party making the representation is bound by it. So also in the case of *The Cheltenham and Great Western Union Railway Company v. Daniel* (a) a party who had not done the acts necessary to make him a proprietor, claimed to be * registered, and was * 595 registered ; he then said that he was not a shareholder, because the deed of settlement had not been followed, and he had been improperly admitted a member : it was, however, held that he was bound by the representations he had made and in consequence of which he had been registered, and that he was not at liberty to allege that invalidity which an utter stranger perhaps might have done. These cases I myself followed in Ireland in *Taylor v. Hughes*, (b) and I have never had any reason to doubt that the law was well settled by them. The result, therefore, is that so far from its being necessary to make a man a contributory that he should be *modo et forma* a member according to the strict provisions of the deed of settlement, that, on the contrary, if a man, by representations that he is entitled to be registered, becomes registered and admitted *de facto* as a shareholder, he is not at liberty, as against those who do not dispute his liability, to refer to or insist on any invalidity as a ground for not being treated as a shareholder. So if the directors themselves do an irregular act, and admit a man and treat him as a shareholder, they are also bound. This is not like what took place in *Ex parte Morgan*, (c) where there was a direct violation of the substance of the powers given to the directors : the matters to which I have referred are matters of regulation which in a sense are within the power and the competency of the directors ; and though they are not at liberty to disregard the deed of settlement, yet if they do, and then deal with mankind and mankind deal with them on the faith that every thing is rightly done, and they give, as here, a certificate solemnly declaring that the person named in it is entitled to so many shares in the company, they will be bound. Speaking, then, generally as regards this case, and particularly as regards the deed in question, I am clearly of opinion that the deed is binding both

(a) 2 Railway Cases, 728. (b) 2 Jones & Lat. 24. (c) 1 Mac. & G. 225.

at law and in equity on Mr. Traffon, so far as regards his liability as a contributory, and that he can never be heard to say that it was not executed by him.

* 596 * It was further argued that on a great many points the transaction in question was invalid; and, first, it was said that the deed of settlement was not executed by Mr. Traffon. Although some of the articles of the deed certainly seem to refer to its execution by a new shareholder as being necessary, there is no express direction to that effect: there is, however, a clause that, if the directors shall require it, the party shall execute a deed of covenant to two of the public officers, to abide by the deed of settlement. This is what was done in the present case, and the course was deliberately adopted by the company in the transfer of shares where there was a great number. The question then is, whether it was necessary to execute the deed of settlement itself, in other words whether what was done was not, in substance and in law, an execution of it. If a man is bound to execute a particular deed containing particular covenants, and by the desire of those who have a right to call on him to execute that deed, he executes another deed containing a covenant that he will obey, observe, and perform all the covenants in the principal deed, he becomes bound by the principal deed. So here the purchaser became bound to observe all the provisions of the deed of settlement: he was, by infusion as it were, a party to that deed, just as much as if he had been an original party to and had executed it. The objection has not, in short, any thing of substance in it or any thing approaching to substance. I have already disposed of the objection that the directors did not sign in the margin of the transfers.

Then as to the remainder of the one hundred and twenty shares;—the deed of settlement contained an article that, if a man had once become bound by the deed, he need not again execute it, and the way therefore in which this company transacted their business was, when once a party had executed the

* 597 deed of settlement, * to permit transfers to be made by simply writing across the notices without actually signing the deed of transfer; and I am clearly of opinion that that course of dealing bound all parties, and that every one of these transactions must be deemed valid and binding on both the directors and the shareholders. I consider as belonging to the same class all

the shares which were not bought of the directors themselves, and that Mr. Straffon was liable as a contributory in respect of them: to that extent therefore the order appealed from must be varied.

This brings me to the only other transaction; namely, the purchase from the directors themselves; and this stands on different grounds. The twenty-fifth article of the deed authorizes the directors to buy shares and to sell them again for the best prices that can be obtained, or otherwise to deal therewith as to them shall seem most expedient; and directs that, "every purchaser of such shares shall, when and so soon as he shall have paid his purchase-money to the directors and otherwise have complied with the provisions of the deed of settlement respecting purchasers of shares or such of them as may be applicable to the case now in contemplation, receive from the directors a certificate or transfer of the same shares under the hands of two of their body, and be thereupon recognized as a shareholder in respect of the same shares, and invested with all the rights, privileges, and qualifications incident to the complete ownership of such shares." The directors, having a certain number of shares, sold some of them to this gentleman, who paid for them and obtained a regular certificate. The notice of the proposed transfer is now before me; it is directed to the directors of the company themselves, and is in the following terms: "Take notice, that we, the directors and proprietors of the North of England Joint-stock Banking Company, * in the county of Northumberland, have agreed * 598 to sell and do propose to transfer unto John Straffon of South Shields, in the county of Durham, shipowner, 100 shares now held by us in the capital stock of the North of England Banking Company," at so much per share: this notice is signed by George Binder as managing director; and written across it are the words, "Transferred, 4th Decr. 1844," followed by the name of a person who I suppose is a director. It is, however, said that this transaction is totally void, because the article referred to requires that the party should have complied with the provisions of the deed of settlement respecting purchasers of shares or such of them as may be applicable to the case; and further that there is no deed of transfer, and consequently no names of two directors in the margin. The sale was by the directors themselves, the purchase-money was paid, they gave what they considered a proper notice to themselves and issued a certificate, which is before me,

certifying that the party is entitled to the shares and to all the benefits from them: they also dealt with him thereafter as a shareholder, paying him dividends on those shares just as they did on the other shares. It is impossible after this that the purchaser himself or the directors can be heard to say in a Court of Justice that he is not that which the directors have represented him to be, and that having been thus allowed to become entitled to dividends he is not to be also liable to responsibilities. I am clearly of opinion that the transaction was valid without reference to the deed of settlement:

I am also by no means satisfied that the transaction is not strictly good under that deed itself. The article referred to directs that when the purchaser has paid his money, he is to comply with

the provisions of the deed of settlement or such of them as
* 599 may be applicable * to the case; and when he has done so,

he is to receive from the directors the certificate or transfer of the shares, and thereupon be recognized as a shareholder. If, therefore, the directors give a certificate and recognize a party as a shareholder, neither he nor they can be heard to say, for it amounts to the same thing, but particularly he cannot be heard to say that there is something he ought to have complied with which they, the directors, did not require. I am perfectly content to believe and to hold that every thing was rightly performed up to and preceding the issuing of the certificate. In the course of the argument, I alluded to what of itself would be quite a sufficient answer to any ground of objection on this head. The directors having sold the shares, they would be entitled in this Court to insist on the purchaser doing all proper acts to relieve them from their liability as owners, and he would have a corresponding right against them to compel them, if there was any thing necessary in point of formality to give effect to the sale, to clothe him with any legal interest that might remain in them.

Mr. Traffon must thus be treated as owner of the shares in question; and as such, if not strictly a member of the company, he was at least a contributory. I am, therefore, clearly of opinion that his representatives are liable; and the order that I shall make, will be to put them on the list as contributories for the whole of the seven hundred shares. The present appeal must be dismissed, and with costs.

* In the Matter of the OUNDLE UNION BREWERY * 600
COMPANY, and of the JOINT-STOCK COMPANIES
WINDING-UP ACTS, 1848 and 1849.

CROXTON'S CASE.¹

1852: May 8. Before the Lord Chancellor Lord ST. LEONARDS.

A shareholder in a joint-stock company who had sold his shares, *held*, under the terms of the deed of settlement of the company, not to be a contributory in respect of liabilities of the company incurred previously to the sale of the shares.²

THIS was an appeal by the official manager of the above company, which was being wound up under the provisions of the Winding-up Acts, from an order made on the 25th March, 1851, by the Vice-Chancellor KNIGHT BRUCE, directing the name of George Croxton to be struck out of the list of proprietors or contributories of the company, in which it had been inserted in respect of twenty-five shares, conformably to a decision of the Master pronounced on the 13th March, 1851.

The affairs of the company were carried on under the provisions of a deed of settlement, dated the 29th September, 1836. It appeared that G. Croxton signed this deed and paid on his shares in full; that on the 10th October, 1842, he transferred them to C. F. Yorke, and that all the requisites of the deed of settlement relative to the transfer of shares were on that occasion complied with.

The question, which turned on the language of the deed of settlement, was whether G. Croxton was liable in respect of the shares so transferred down to the date of the transfer. The Master held that he was, and placed his name on the list of contributories as liable to that extent accordingly: the Vice-Chancellor reversed that decision.

* The following are the clauses of the deed which bore on * 601
the determination of the question thus raised: they are, for
convenience of reference, designated as numbers 13, 34, and 36.

¹ S. C. 15 Jur. N. S. 892.

² See Fenn's Case, 4 De G., M. & G. 285; 2 Lindley Partn. (Eng. ed. 1860) 1125, 1126; Holmes's Case, 2 De G., M. & G. 119; 4 De G. & S. 312; Cape's Executor's Case, 2 De G., M. & G. 562; 2 Lindley Partn. (Eng. ed. 1860) 1125 *et seq.*

13. "That no member of the said company, his, her, or their executors or administrators, shall in any case or event (as between himself, herself, and themselves and the other members thereof) be answerable or liable for or in respect of any debts, calls, or demands upon the said company after he, she, or they shall have ceased to be a member or members of or to have a share or interest in the capital stock of the said company in his, her, or their own right or rights or by representation, save only and except for and in respect of any sum or sums which he, she, or they shall or may be liable to pay by reason of any forfeiture, penalty, or misconduct under some clause or provision in these presents contained."

34. "That from and immediately after any such transfer or assignment as last aforesaid shall be made of any share or shares, the former or last proprietor thereof shall thenceforth be for ever acquitted and discharged of and from all covenants, agreements, regulations, obligations, and liabilities whatsoever under or by virtue of these presents for or in respect of the share or shares which shall have been by him, or her, or them so assigned or transferred, save only in respect of any penalty, forfeiture, or liability which shall have been previously incurred by him, her, or them in regard thereto."

36. "That every person who shall hereafter purchase any share or shares in the capital of the company and who previously to such purchase shall have executed these presents or a deed of covenant prepared by the direction of the board of directors by which
* 602 he * or she shall covenant to abide by the regulations of the company, and who at the time of such purchase shall be a proprietor of the company to all purposes in respect of the shares then held by him or her in the capital thereof, shall as to the share or shares so purchased be considered from the time of such purchase a proprietor to all purposes in respect of the same shares and shall not be required to execute such deed of covenant as aforesaid, and shall hold the shares so purchased on the same terms and conditions in every respect as the original holder of the same share or shares would have held the same if he or she had continued a proprietor of the company in respect thereof."

Mr. Rozburgh (with whom was *Mr. Bacon*, who was absent) referred to the clauses above set out. He contended that the seller continued liable to the losses of the company incurred prior to the

transfer, and relied especially on the words of exception in the thirty-fourth clause.

Mr. Rolt and *Mr. H. Clarke* appeared for G. Croxton, but were not called on.

THE LORD CHANCELLOR. — The point in this case is not open to any doubt. The intention of the deed is clear; namely, that a party buying shares from a shareholder shall come into the place of the seller and take his advantages and liabilities. The thirteenth clause of the deed is, — [his Lordship here read the clause].

It is quite clear from this that the seller is from the time of sale released from liability in respect of all demands upon the company, but not from personal liabilities which he may have incurred to the company; and *the seventeenth clause * 603 provides, in effect, that no person shall cease to be a member without the consent of the other partners, and without their approval of the person intended to succeed him as a member. Then follows the thirty-fourth clause which is, — [his Lordship here read the clause].

There would be no difficulty but for the words in the latter part of it, “save only in respect of any penalty, forfeiture, or liability which shall have been previously incurred by him, her, or them in regard thereto.” This exception cannot, however, be meant to apply to those liabilities from which the seller has been previously released: it is used in the same sense as the exception in the thirteenth clause, and applies to the personal liabilities of the seller to the company, and not to the liabilities of the company itself; from these latter the seller is expressly released.

The thirty-sixth clause has also been referred to as limiting the purchaser's liability; but its true effect is merely to point out the period from which the liability commences; namely, the date of the purchase. The extent of the liability is not governed by the time: from the date of his purchase the purchaser stands in the place of the seller, and is liable as the seller would have been had he continued to own the shares. The case appears to me to be quite clear, and the present motion must be therefore refused.

1852. May 22, 26. Before the Lord Chancellor Lord St. LEONARDS.

J. W. agreed with B. L. that she, J. W., would sing at B. L.'s theatre during a certain period of time, and would not sing elsewhere without his written authority. *Held*, on a bill filed to restrain J. W. from singing for a third party, and granting an injunction for that purpose, that the positive and negative stipulations of the agreement formed but one contract, and that the Court would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract.² *Kemble v. Kean*, 6 Sim. 333, and *Kimberley v. Jennings*, 6 Sim. 340, overruled. The plaintiff relied on the defendant's knowledge of a fact said to be communicated to them in a letter, of which no copy was kept, but the receipt of which the defendants admitted. The defendants denied that it contained the statement alleged, but did not produce the letter, or satisfactorily account for its non-production. *Held*, under these circumstances, that the plaintiff's representation must be taken to be true.

THE bill in this suit was filed on the 22d April, 1852, by Benjamin Lumley, the lessee of her Majesty's Theatre, against Johanna Wagner, Albert Wagner, her father, and Frederick Gye, the lessee of Covent Garden Theatre: it stated that in November, 1851, Joseph Bacher, as the agent of the defendants Albert Wagner and Johanna Wagner, came to and concluded at Berlin an agreement in writing in the French language, bearing date the 9th November,

¹ S. C., 5 De G. & S. 485; 16 Jur. 871.

² The authority of this decision was recognized in the *South Wales Railway Co. v. Wythes*, 5 De G., M. & G. 880; and the principle of it was carried out in *Taunton Copper Manuf. Co. v. Cook*, 24 Law Rep. (Boston, July, 1862), 547. The case is said to have "been repeatedly followed" in *Catt v. Tourle*, L. R. 4 Ch. Ap. 654, 660. It is cited as an authority in *Peabody v. Norfolk*, 98 Mass. 452, 461. See *Stevens v. Benning*, 6 De G., M. & G. 223; *Johnson v. The Shrewsbury and Birmingham Railway Co.*, 3 De G., M. & G. 914; *Turner v. Evans*, 2 De G., M. & G. 740; *Great Northern Railway v. Manchester, Sheffield, and Lincolnshire Railway*, 5 De G. & S. 138; *Webster v. Dillon*, 3 Jur. N. S. 432, V. C. W.; *Ogden v. Fossick*, 11 W. R. 128, L. JJ.; 2 Dan. Ch. Pr. (4th Am. ed.) 1656, 1657; *Lumley v. Gye*, 2 El. & Bl. 216; *Fechter v. Montgomery*, 33 Beav. 22; *Ainsworth v. Bentley*, 14 W. R. 630, V. C. W.; 2 Story Eq. Jur. § 958 a; *Hood v. North-Eastern Railway Co.*, L. R. 8 Eq. 666; *Catt v. Tourle*, L. R. 4 Ch. Ap. 654. But see *Mair v. Himalaya Tea Co.*, L. R. 1 Eq. 411; 11 Jur. N. S. 1013, V. C. W.; *Brett v. East India and London Shipping Co.*, 2 H. & M. 404; *Sanquirico v. Benedetti*, 1 Barb. 315; *Hope v. Hope*, 22 Beav. 351; *Sanders v. Rodway*, 16 Beav. 207; *Paxton v. Newton*, 2 Sm. & Gif. 437.

1851, and which agreement, being translated into English, was as follows :—

“The undersigned Mr. Benjamin Lumley, possessor of her Majesty’s Theatre at London, and of the Italian Opera at Paris, of the one part, and Mademoiselle Johanna Wagner, cantatrice of the Court of his Majesty the King of Prussia, with the consent of her father, Mr. A. Wagner, residing at Berlin, of the other part, have concerted and concluded the following contract. First, Mademoiselle Johanna Wagner binds herself to sing three months at the theatre of Mr. Lumley, her Majesty’s, at London, to date from the 1st of April, 1852, (the * time necessary for the * 605 journey comprised therein), and to give the parts following : 1st, *Romeo*, *Montecchi* ; 2d, *Fides*, *Prophète* ; 3d, *Valentine*, *Huguenots* ; 4th, *Anna*, *Don Juan* ; 5th, *Alice*, *Robert le Diable* ; 6th, An opera chosen by common accord. Second, The three first parts must necessarily be, 1st, *Romeo* ; 2d, *Fides* ; 3d, *Valentine* : these parts once sung, and then only she will appear, if Mr. Lumley desires it, in the three other operas mentioned aforesaid. Third, These six parts belong exclusively to Mademoiselle Wagner, and any other cantatrice shall not presume to sing them during the three months of her engagement. If Mr. Lumley happens to be prevented, by any cause soever, from giving these operas, he is nevertheless held to pay Mademoiselle Johanna Wagner the salary stipulated lower down for the number of her parts as if she had sung them. Fourth, In the case where Mademoiselle Wagner should be prevented by reason of illness from singing in the course of a month as often as it has been stipulated, Mr. Lumley is bound to pay the salary only for the parts sung. Fifth, Mademoiselle Johanna Wagner binds herself to sing twice a week during the run of the three months ; however, if she herself was hindered from singing twice in any week whatever, she will have the right to give at a later period the omitted representation. Sixth, If Mademoiselle Wagner, fulfilling the wishes of the direction, consent to sing more than twice a week in the course of three months, this last will give to Mademoiselle Wagner 50*l.* sterling for each representation extra. Seventh, Mr. Lumley engages to pay Mademoiselle Wagner a salary of 400*l.* sterling per month, and payment will take place in such manner that she will receive 100*l.* sterling each week. Eighth, Mr. Lumley will pay by letters of exchange to Mademoiselle Wagner at Berlin, the 15th of March, 1852, the

sum of 300*l.* sterling, a sum which will be deducted from
 * 606 her engagement in his * retaining 100*l.* each month.

Ninth, In all cases except that where a verified illness would place upon her a hindrance, if Mademoiselle Wagner shall not arrive in London eight days after that from whence dates her engagement, Mr. Lumley will have the right to regard the non-appearance as a rupture of the contract, and will be able to demand an indemnification. Tenth, In the case where Mr. Lumley should cede his enterprise to another, he has the right to transfer this contract to his successor, and in that case Mademoiselle Wagner has the same obligations and the same rights towards the last as towards Mr. Lumley.

JOHANNA WAGNER,
 ALBERT WAGNER."

"Berlin, the 9th November, 1851."

The bill then stated, that in November, 1851, Joseph Bacher met the plaintiff in Paris, when the plaintiff objected to the agreement as not containing an usual and necessary clause, preventing the defendant Johanna Wagner from exercising her professional abilities in England without the consent of the plaintiff, whereupon Joseph Bacher, as the agent of the defendants Johanna Wagner and Albert Wagner, and being fully authorized by them for the purpose, added an article in writing in the French language to the agreement, and which, being translated into English, was as follows:—

† "Mademoiselle Wagner engages herself not to use her talents at any other theatre, nor in any concert or reunion, public or private, without the written authorization of Mr. Lumley.

"Dr. JOSEPH BACHER,

"For Mademoiselle Johanna Wagner,
 and authorized by her."

The bill then stated that the defendants J. and A. Wagner
 * 607 ner subsequently made another engagement with the * defendant F. Gye, by which it was agreed that the defendant J. Wagner should, for a larger sum than that stipulated by the agreement with the plaintiff, sing at the Royal Italian Opera, Covent Garden, and abandon the agreement with the plaintiff. The bill then stated that the defendant F. Gye had full knowledge of the previous agreement with the plaintiff, and that the plaintiff had

received a protest from the defendants J. and A. Wagner, repudiating the agreement on the allegation that the plaintiff had failed to fulfil the pecuniary portion of the agreement.

The bill prayed that the defendants Johanna Wagner and Albert Wagner might be restrained from violating or committing any breach of the last article of the agreement; that the defendant Johanna Wagner might be restrained from singing and performing, or singing at the Royal Italian Opera, Covent Garden, or at any other theatre or place without the sanction or permission in writing of the plaintiff during the existence of the agreement with the plaintiff; and that the defendant Albert Wagner might be restrained from permitting or sanctioning the defendant Johanna Wagner singing and performing, or singing as aforesaid; that the defendant Frederick Gye might be restrained from accepting the professional services of the defendant Johanna Wagner as a singer and performer, or singer at the said Royal Italian Opera, Covent Garden, or at any other theatre or place, and from permitting her to sing and perform or to sing at the Royal Italian Opera, Covent Garden, during the existence of the agreement with the plaintiff, without the permission or sanction of the plaintiff.

The answer of the defendants A. and J. Wagner attempted to show that Joseph Bacher was not their authorized agent, at least for the purpose of adding the restrictive clause, and that the plaintiff had failed to make the stipulated * payment by the * 608 time mentioned in the agreement. The plaintiff having obtained an injunction from the Vice-Chancellor Sir JAMES PARKER on the 9th May, 1852, the defendants now moved, by way of appeal before the Lord Chancellor,* to discharge his Honor's order.

Mr. Bethell, Mr. Malins, and Mr. Martindale, in support of the appeal motion. — We submit that, the agreement in the present case being one of which the Court cannot decree specific performance, the jurisdiction by injunction does not attach. The Vice-Chancellor has rested his decision mainly on the authority of *Dietrichsen v. Cabburn*, (a) but there the decision was founded on

* The case was heard by the Lord Chancellor on a representation that it was intended to confine the argument to the legal question alone, which it was said involved an important point of equity jurisdiction, on which the authorities were conflicting.

(a) 2 Phil. 52.

the special circumstances of the case tending to establish a partnership, which clearly does not exist here, nor does it warrant such an extension of the principle as has been assumed to be there established; this is shown by the observations of Lord COTTENHAM himself in the subsequent case of *Heathcote v. The North Staffordshire Railway Company*. (a) In that case, on dissolving an injunction which had been granted by the Vice-Chancellor of England, restraining the company from applying to Parliament for powers to relieve them from the performance of their contract, his Lordship said, "The covenant is a mere legal contract which the Act asked for may prevent the defendant from performing, but that is all: if A. contract with B. to deliver goods at a certain time and place, will equity interfere to prevent A. from doing any thing which may or can prevent him from so delivering the goods?"

If, indeed, A. had agreed to sell an estate to B. and then * 609 proposed to deal * with the estate so as to prevent him from performing his contract, equity would interfere; because in that case B. would, by the contract, have obtained an interest in the estate itself, which, in the case of the goods, he would not." We contend that the agreement is a purely personal contract, for the infraction of which damages are a complete and ample remedy: the agreement is in fact nothing more than a contract of hiring and service, and whatever the relation between the employer and employed may be, whether master and servant, or principal and agent, or manager and actor, this Court will, in all such cases, abstain from interfering, either directly or indirectly. *Kemble v. Kean*, (b) *Kimberley v. Jennings*, (c) *Stocker v. Brockelbank*. (d)

[THE LORD CHANCELLOR. — In the case of *Stocker v. Brockelbank* there was no negative covenant.]

The general principle upon which we rely is, that this Court never interferes to restrain the breach of the negative part of a contract in any case where it cannot specifically enforce the performance of the positive part of the contract. *Baldwin v. The Society for the Diffusion of Useful Knowledge*, (e) *Hooper v. Brod-*

(a) 2 Mac. & G. 100.

(d) 3 Mac. & G. 250.

(b) 6 Sim. 333.

(e) 9 Sim. 393.

(c) 6 Sim. 340.

rick, (a) *Hills v. Croll*. (b) The earlier authorities cited by the plaintiff in the Court below, namely, *Martin v. Nutkin*, (c) *Barret v. Blagrove*, (d) *Morris v. Colman*, (e) are all distinguishable. In the case of *Martin v. Nutkin*, (c) the ringing of the bells was restrained, because not only was there no adequate remedy at law, but the contract was one clearly falling within the ordinary jurisdiction of the Court for specific performance. The same remark applies also to the case of *Barret v. Blagrove*, (d)

* which involved the doctrine of part performance, the * 610 tenant having enjoyed the benefits of the lease. In *Morris v. Colman*, (e) the injunction was granted upon the ground of partnership, as shown by Lord ELDON in the case of *Clarke v. Price*; (g) and, applying the language of his Lordship in that case to the present, we say that if the agreement is one which the Court will not carry into execution (and this must be admitted) the Court cannot indirectly enforce it.

[THE LORD CHANCELLOR observed that in the case of *Blakemore v. The Glamorganshire Canal Navigation*, (h) Lord ELDON had got over his scruples; for he there granted an injunction, the effect of which was indirectly to compel the company to restore certain works to the state in which they originally stood. His Lordship added that he had always felt some difficulty in acquiescing in the propriety of that decision.]

The utmost extent to which the Court ought to go in granting such prohibitory injunctions, when a proper case is shown for its interference, is in the form adopted in the case of *Robinson v. Lord Byron*, (i) where the defendant was restrained from preventing the flow of water in the usual quantities; but it is to be observed that, wherever there is a clear legal remedy, as exists in the present instance, this Court will decline to interfere in cases arising out of the doctrine of specific performance. *Collins v. Plumb*. (k)

[THE LORD CHANCELLOR.—This Court interferes by injunction

(a) 11 Sim. 47.

(b) 2 Phil. 60.

(c) 2 P. W. 266.

(d) 5 Ves. 555.

(e) 18 Ves. 437.

(g) 2 Wils. 157.

(h) 1 M. & K. 154.

(i) 1 Bro. C. C. 588.

(k) 16 Ves. 454.

in the case of articted clerks, surgeons' apprentices, &c., who have covenanted, after they leave their Masters not to practise within certain limits, although no question of specific performance is involved.]

* 611 * Those cases, of which *Swallow v. Wallingford* (a) is an example, are in the nature of concluded contracts, and where the jurisdiction of this Court is only exercised with the view of effectuating the whole contract by preventing the party who has received a valuable consideration for his covenant, from infringing that covenant. On the same principle, as well as to prevent the commission of irreparable damage, a tenant was restrained from violating a covenant he had entered into with his landlord not to burn the demised lands. *Gervais v. Edwards*. (b)

Mr. Bacon and *Mr. H. Clarke*, contra, in support of the injunction.—The prayer of the bill in the present case is not for specific performance and for an injunction as ancillary to that relief, but for an injunction simply, to prevent the violation of the negative stipulation in the defendants' agreement. With respect to the alleged distinction in the case of *Morris v. Coleman*, (c) on the ground of a partnership, that was in fact no distinction, nor did it form an element in the decision of the case, which was based solely on the existence of the negative stipulation ; and the case of *Clarke v. Price*, (d) which was relied upon by the appellants, serves clearly to illustrate this position, for in that case not only was there a prayer for specific performance, but the agreement contained no negative stipulation. The cases of *Kemble v. Kean*, (e) and *Kimberley v. Jennings*, (g) are the only two cases which are at all opposed to the uniform current of authority, which establishes the plaintiff's right to the injunction ; but it is to be observed,

* 612 that Sir L. SHADWELL, who decided these * two cases, was himself the Judge who, in the subsequent case of *Rolfe v. Rolfe*, (h) recognized and acted upon the distinction for which we contend, thereby virtually if not actually overruling his previous decisions. We rely upon the decision of Lord COTTENHAM in *Die-*

(a) 12 Jur. 403.

(e) 6 Sim. 338.

(b) 2 Dru. & War. 80.

(g) 6 Sim. 340.

(c) 18 Ves. 437.

(h) 15 Sim. 88.

(d) 2 Wils. 157.

trichsen v. Cabburn; (a) he there says, "If the bill states a right or title in the plaintiff to the benefit of the negative agreement of the defendant, or of his abstaining from the contemplated act, it is not, as I conceive, material whether the right be at law or under an agreement which cannot be otherwise brought under the jurisdiction of a Court of Equity." On this principle the Court acts in restraining the violation of covenants in a lease, by a tenant. *French v. Macale*. (b) The same doctrine was also recognized by Lord LANGDALE, in the case of *Whittaker v. Howe*, (c) where he says: "I do not think that this Court can refuse to grant an injunction to restrain the violation of a contract or covenant, because there may be some part of the agreement which the Court could not compel the defendant specifically to perform." It was said that this Court would, at all events, only interfere in cases where there had been part performance, but such a construction would exclude all executory contracts. In the present case, however, there has been a part performance, inasmuch as the plaintiff has incurred considerable expense in preparing operas in which the defendant J. Wagner was to sing. It was further said that the Court never interferes in cases like the present, which was alleged to be one of personal service; but in the case of articulated clerks, &c., the Court has continually restrained them from practising within certain limits, in violation of their agreements.

Mr. Bethell, in reply. — * The jurisdiction of the Court in * 613 granting injunctions may be said to be limited to four classes of cases. The first class includes those where its aid is sought to obtain preventive relief, and where, if not granted, irreparable mischief would ensue, as in the cases of nuisances and infringement of patents. The second class includes those in which the injunction is ancillary to the relief prayed, as in *Whittaker v. Howe*, (d) which being a case of partnership, the injunction was auxiliary for the purpose of preserving the *status quo*; in the present instance, however, the injunction, so far from being in the nature of ancillary relief, prejudices the whole case. The third class of cases embraces those where the Court, being able to give direct and full relief, has restrained the breach of unilateral agreements when only one part

(a) 2 Phil. 52; see p. 58.

(c) 3 Beav. 383; see p. 395.

(b) 2 Dru. & War. 269.

(d) 3 Beav. 383.

remains to be performed, and the effect of the injunction is to afford a complete remedy, and to leave no part of the agreement unperformed: thus, for example, in the case of restraining a tenant from committing a breach of his covenant, the whole contract is directly and positively performed; and the same remark is applicable to the decision in *Rolfe v. Rolfe*, (a) where the whole of the agreement had been completed, with the exception of the part which remained to be performed by the operation of the injunction, besides the question there resulted out of a partnership transaction. Where, however, the Court by its interference cannot do the complete act which was the subject of the agreement between the parties, it has declined to interfere. *Smith v. Fromont*. (b) In the case now under discussion, the Court is called upon to deal indirectly with part of an agreement, in which the negative portion is so involved with the positive as to be only subservient to the whole agreement. There is also a fourth class of cases; namely, * 614 bills of peace, in which the Court is in the * habit of granting a perpetual injunction to quiet the possession of the plaintiff, but those are inapplicable to the present.

THE LORD CHANCELLOR. — The question which I have to decide in the present case arises out of a very simple contract, the effect of which is, that the defendant Johanna Wagner should sing at her Majesty's Theatre for a certain number of nights, and that she should not sing elsewhere (for that is the true construction) during that period. As I understand the points taken by the defendants' counsel in support of this appeal, they in effect come to this; namely, that a Court of Equity ought not to grant an injunction except in cases connected with specific performance, or where the injunction being to compel a party to forbear from committing an act (and not to perform an act), that injunction will complete the whole of the agreement remaining unexecuted.

I have then to consider how the question stands on principle and on authority, and in so doing I shall observe upon some of the cases which have been referred to and commented upon by the defendants in support of their contention. The first was that of *Martin v. Nutkin*, (c) in which the Court issued an injunction restraining an act from being done where it clearly could not have

(a) 15 Sim. 88.

(b) 2 Swanst. 330.

(c) 2 P. W. 266.

granted any specific performance: but then it was said that that case fell within one of the exceptions which the defendants admit are proper cases for the interference of the Court, because there the ringing of the bells, sought to be restrained, had been agreed to be suspended by the defendant in consideration of the erection by the plaintiffs of a cupola and clock, the agreement being in effect the price stipulated for the defendant's relinquishing bell-ringing at stated periods; the defendant having accepted the * benefit, but rejected the corresponding obligation, * 615 Lord MACCLESFIELD first granted the injunction which the Lords Commissioners, at the hearing of the cause, continued for the lives of the plaintiffs. That case therefore, however it may be explained as one of the exceptional cases, is nevertheless a clear authority showing that this Court has granted an injunction prohibiting the commission of an act in respect of which the Court could never have interfered by way of specific performance.

The next case referred to was that of *Barret v. Blagrove*, (a) which came first before Lord LOUGHBOROUGH, and afterwards before Lord ELDON. (b) There a lease had originally been granted by the plaintiffs, the proprietors of Vauxhall Gardens, of an adjoining house, under an express covenant that the lessee would not carry on the trade of a victualler or retailer of wines, or generally any employment that would be to the damage of the proprietors of Vauxhall Gardens; an underlease having been made to the defendants, who were violating the covenant by the sale of liquors, the proprietors of Vauxhall Gardens filed a bill for an injunction, which was granted by Lord LOUGHBOROUGH. It has been observed in the argument here, that in granting the injunction Lord LOUGHBOROUGH said, "It is in the nature of specific performance," and that therefore that case also falls under one of the exceptional cases. When that case came before Lord ELDON, he dissolved the injunction, but upon a different ground, namely, on that of acquiescence for many years, and in a sense he treated it as a case of specific performance. As far as the words go, the observations of those two eminent Judges would seem to justify the argument which has been addressed to me; in effect, however, it was only specific performance, because a prohibition, preventing * the commission of an act, may as effectually perform an * 616

(a) 5 Ves. 555.

(b) 6 Ves. 104.

agreement as an order for the performance of the act agreed to be done. The agreement in that case being, that the house should not be opened for the purposes of entertainment to the detriment of Vauxhall Gardens, the Court granted the injunction ; that was a performance of the agreement in substance, and the term "specific performance" is aptly applied in such a case, but not in the sense in which it has been used before me.

It was also contended that the plaintiff's remedy, if any, was at law ; but it is no objection to the exercise of the jurisdiction by injunction, that the plaintiff may have a legal remedy. The case of *Robinson v. Lord Byron* (a) before Lord THURLOW, so very often commented upon by succeeding Judges, is a clear illustration of that proposition, because in that case the defendant, Lord Byron, who had large pieces of water in his park which supplied the plaintiff's mills, was abusing his right by preventing a regular supply to the plaintiff's mill, and although the plaintiff had a remedy at law, yet this Court felt no difficulty in restraining Lord Byron by injunction from preventing the regular flow of the water. Undoubtedly there are cases such as that cited for the defendants of *Collins v. Plumb*, (b) before Lord ELDON, in which this Court has declined to exercise the power (which in that instance it was assumed to have had) of preventing the commission of an act, because such power could not be properly and beneficially exercised. In that case the negative covenant, not to sell water to the prejudice of the plaintiffs, was not enforced by Lord ELDON, not because he had any doubt about the jurisdiction of the Court (for upon that point he had no doubt), but because it was impossible to ascertain every time the water was supplied

* 617 by the defendants, whether it was or not * to the damage of the plaintiffs ; but whether right or wrong, that learned Judge, in refusing to exercise the jurisdiction on very sufficient grounds, meant in no respect to break in on the general rules deducible from the previous authorities.

At an early stage of the argument I adverted to the familiar cases of attorneys' clerks, and surgeons' and apothecaries' apprentices, and the like, in which this Court has constantly interfered, simply to prevent the violation of negative covenants ; but it was said that in such cases the Court only acted on the principle

(a) 1 Bro. C. C. 588.

(b) 16 Ves. 454.

that the clerk or apprentice had received all the benefit, and that the prohibition operated upon a concluded contract, and that therefore the injunction fell within one of the exceptional cases. I do not, however, apprehend that the jurisdiction of the Court depends upon any such principle: it is obvious that in those cases the negative covenant does not come into operation until the servitude is ended, and therefore that the injunction cannot be required or applied for before that period.

The familiar case of a tenant covenanting not to do a particular act was also put during the argument;¹ but it was said that in such a case the jurisdiction springs out of the relation of landlord and tenant, and that the tenant having received the benefit of an executed lease, the injunction operates only so as to give effect to the whole contract; that, however, cannot be the principle on which this Court interferes, for, beyond all doubt, where a lease is executed containing affirmative and negative covenants, this Court will not attempt to enforce the execution of the affirmative covenants, either on the part of the landlord or the tenant, but will leave it entirely to a Court of Law to measure the damages; though with respect to the negative covenants, if the tenant for example has stipulated * not to cut or lop timber, or any * 618 other given act of forbearance, the Court does not ask how many of the affirmative covenants on either side remain to be performed under the lease, but acts at once by giving effect to the negative covenant, specifically executing it by prohibiting the commission of acts which have been stipulated not to be done. So far, then, each of the cases to which I have referred appears to me to be in direct contravention of the rules which have been so elaborately pressed upon me by the defendants' counsel.

The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and the other by the defendants, which state of facts may have and in some cases has introduced a very important difference, — but of an act to be done by J. Wagner alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant — the one being ancillary to, concurrent, and operating together with the other. The agreement to sing for the plaintiff during three months at his theatre,

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1655, 1656.

and during that time not to sing for anybody else, is not a correlative contract, it is in effect one contract; and though beyond all doubt this Court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself. I am of opinion, that if she had attempted, even in the absence of any negative stipulation to perform at another theatre, she would have broken the * 619 spirit and * true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered.

Wherever this Court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other; and although the jurisdiction is not to be extended, yet a Judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity.

It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant J. Wagner from performing at any other theatre while this Court had no power to compel her to perform at her Majesty's Theatre. It is true, that I have not the means of compelling her to sing, but she has no cause of complaint, if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement. The jurisdiction which I now exercise is wholly within the power of the Court, and being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce. The effect too of the injunction, in restraining J. Wagner from singing

elsewhere may, in the event of an action being brought against her by the plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be *inclined to give if she had carried her talents and * 620 exercised them at the rival theatre: the injunction may also, as I have said, tend to the fulfilment of her engagement; though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly.

Referring again to the authorities, I am well aware that they have not been uniform, and that there undoubtedly has been a difference of decision on the question now revived before me; but, after the best consideration which I have been enabled to give to the subject, the conclusion at which I have arrived is, I conceive, supported by the greatest weight of authority. The earliest case most directly bearing on the point is that of *Morris v. Colman*: (a) there Mr. Colman was a part proprietor with Mr. Morris of the Haymarket Theatre, and they were partners in that concern, and by the deed of partnership Mr. Colman agreed that he would not exercise his dramatic abilities for any other theatre than the Haymarket; he did not, however, covenant that he would write for the Haymarket, but it was merely a negative covenant that he would not write for any other theatre than the Haymarket. Lord ELDON granted an injunction against Mr. Colman writing for any other theatre than the Haymarket; and the ground on which Lord ELDON assumed that jurisdiction was the subject of some discussion at the bar. It was truly said for the defendants that that was a case of partnership; and it was said, moreover, that Lord COTTENHAM was mistaken in the case of *Dietrichsen v. Cabburn*, (b) when he said that Lord ELDON had not decided *Morris v. Colman* on the ground of there being a partnership. I agree that the observations which fell from Lord ELDON in the subsequent case of *Clarke v. Price*, (c) show that he did mainly decide it on the ground of partnership; *but he did not decide it * 621 exclusively on that ground. In the argument of *Morris v. Colman*, (a) Sir SAMUEL ROMILLY suggested a case almost identical with the present: he contended that the clause restraining Mr. Colman from writing for any other theatre was no more against public policy than a stipulation that Mr. Garrick should

(a) 18 Ves. 437.

(b) 2 Phil. 52.

(c) 2 Wils. 157.

not perform at any other theatre than that at which he was engaged would have been. Lord ELDON, adverting in his judgment to the case put at the bar, said: "If Mr. Garrick was now living, would it be unreasonable that he should contract with Mr. Colman to perform only at the Haymarket Theatre, and Mr. Colman with him to write for the theatre alone? Why should they not thus engage for the talents of each other?" He gives the clearest enunciation of his opinion, that that would be an agreement which this Court would enforce by way of injunction.

The late Vice-Chancellor SHADWELL, of whom I always wish to be understood to speak with the greatest respect, decided in a different way, in the cases of *Kemble v. Kean*, (a) and *Kimberley v. Jennings*, (b) on which I shall presently make a few observations. In the former case, he observed that Lord ELDON must be understood, in the case of *Morris v. Colman*, (c) to have spoken according to the subject-matter before him, and must there be considered to be addressing himself to a case in which Colman and Garrick would both have had a partnership interest in the theatre. I must, however, entirely dissent from that interpretation. Lord ELDON's words are perfectly plain; they want no comment upon them; they speak for themselves. He was alluding to a case in which Garrick, as a performer, would have had nothing to do with the theatre beyond the implied engagement that

* 622 he would not perform anywhere else; and I have * come to a very clear conclusion that Lord ELDON would have granted the injunction in that case, although there had been no partnership.

The authority of *Clarke v. Price*, (d) was much pressed upon me by the learned counsel for the defendants; but that is a case which does not properly belong to their argument, because there was no negative stipulation, and I quite admit that this Court cannot enforce the performance of such an affirmative stipulation as is to be found in that case; there the defendant having agreed to take notes of cases in the Court of Exchequer, and compose reports for the plaintiff, and having failed to do so, the plaintiff, Mr. Clarke, filed a bill for an injunction, and Lord ELDON, when refusing the injunction, in effect said, I cannot compel Mr. Price to sit in the Court of Exchequer and take notes and compose

(a) 6 Sim. 333.

(c) 18 Ves. 437.

(b) 6 Sim. 340.

(d) 2 Wils. 157.

reports; and the whole of his judgment shows that he proceeded (and so it has been considered in later cases) on the ground that there was no covenant, on the part of the defendant, that he would not compose reports for any other person. The expressions in the judgment are: "I cannot, as in the other case" [referring to *Morris v. Colman*, (a)], "say that I will induce him to write for the plaintiff by preventing him from writing for any other person;" and then come these important words: "for that is not the nature of the agreement." Lord ELDON therefore was of opinion, upon the construction of that agreement, that it would be against its meaning to affix to it a negative quality and import a covenant into it by implication, and he therefore, very properly as I conceive, refused that injunction; that case, therefore, in no respect touches the question now before me, and I may at once declare, that if I had only to deal with the affirmative covenant of the defendant J. Wagner that she would perform at her Majesty's Theatre, I should not have granted any injunction.

* Thus far, I think, the authorities are very strong against * 623 the defendants' contention; but the case of *Kemble v. Kean*, (b) to which I have already alluded, is the first case which has in point of fact introduced all the difficulties on this part of the law. There Mr. Kean entered into an agreement precisely similar to the present: he agreed that he would perform for Mr. Kemble at Drury Lane, and that he would not perform anywhere else during the time that he had stipulated to perform for Mr. Kemble. Mr. Kean broke his engagement, a bill was filed, and the Vice-Chancellor SHADWELL was of opinion that he could not grant an injunction to restrain Mr. Kean from performing elsewhere, which he was either about to do or actually doing, because the Court could not enforce the performance of the affirmative covenant that he would perform at Drury Lane for Mr. Kemble. Being pressed by that passage which I have read from in the Lord Chancellor's judgment in *Morris v. Colman*, (c) he put that paraphrase or commentary upon it which I have referred to; that is, he says: "Lord ELDON is speaking of a case where the parties are in partnership together." I have come to a different conclusion; and I am bound to say that, in my apprehension, the case of *Kemble v. Kean* was wrongly decided and cannot be maintained.¹

(a) 18 Ves. 437.

(b) 6 Sim. 333.

(c) 18 Ves. 437.

¹ See 2 Story Eq. Jur. § 958 a.

The same learned Judge followed up his decision in that case in the subsequent one of *Kimberley v. Jennings*; (a) that was a case of hiring and service, and the Vice-Chancellor there virtually admitted that a negative covenant might be enforced in this Court, and quoted an instance to that effect within his own knowledge.

He said: "I remember a case in which a nephew wished to go on the stage, and his uncle gave him a large sum of money

* 624 in consideration of his covenanting not to *perform within a particular district; the Court would execute such a covenant, on the ground that a valuable consideration had been given for it." He admits therefore the jurisdiction of the Court, if nothing but that covenant remained to be executed. The learned Judge, however, adds, "but here the negative covenant does not stand by itself: it is coupled with the agreement for service for a certain number of years, and then for taking the defendant into partnership: . . . this agreement cannot be performed in the whole, and therefore this Court cannot perform any part of it." Whatever may have been the mutual obligations in that case, which prevented the Court from giving effect to the negative covenant, I am not embarrassed with any such difficulties here, because, as I have already shown, both the covenants are on the part of the defendants.

The case of *Hooper v. Brodrick* (b) was cited, as an instance in which the Court had refused an injunction under circumstances like the present; but, in that case, the lessee of an inn had covenanted to use and keep it open as an inn during a certain time, and not to do any act whereby the license might become forfeited. In point of fact the application was that he might be compelled to keep it open, and the Vice-Chancellor makes this observation: "The Court ought not to have restrained the defendant from discontinuing to use and keep open the demised premises as an inn, which is the same in effect as ordering him to carry on the business of an innkeeper; but it might have restrained him from doing, or causing or permitting to be done, any act which would have put it out of his power, or the power of any other person, to carry on that business on the premises. It is not, however, shown that the defendant has threatened, or intends to do, or to cause or

* 625 permit to be done, any act whereby the *licenses may

(a) 6 Sim. 340.

(b) 11 Sim. 47.

become forfeited or be refused ; and therefore the injunction must be dissolved." That therefore is an authority directly against the defendants, because it shows that if there had been an intention to break the negative covenant this Court would have granted the injunction.

The case of *Smith v. Fromont* (a) was also relied upon by the defendants, as an instance where the injunction had been refused, but there there was no negative covenant ; it was an attempt to restrain, by injunction, a man from supplying horses to a coach for a part of a road, when the party who was applying for the injunction was himself incapable of performing his obligation to horse his part of the road. Lord ELDON, in refusing the injunction and deprecating the interference of the Court in such cases, there said : " The only instance I recollect of an application to this Court to restrain the driving of coaches occurred in the case of a person who, having sold the business of a coach proprietor from Reading to London, and undertaking to drive no coach on that road, afterwards established one. With some doubt, whether I was not degrading the dignity of this Court by interfering, I saw my way in that case ; because one party had there covenanted absolutely against interfering with the business which he had sold to the other." That again is a direct authority, therefore, against the defendants, as Lord ELDON expressly says he had interfered in the case of a negative covenant, although he could not interfere on that occasion because there was no such covenant.

Some observations have been made upon a decision of my own in Ireland, in the case of *Gervais v. Edwards* ; (b) * that * 626 decision I believe to be right, but it is quoted to show that I was of opinion that this Court cannot interfere to enforce specific performance, unless it can execute the whole of an agreement. I abide by the opinion I there expressed, and I mean to do nothing in this case which shall in any manner interfere with that opinion. That was properly a case for specific performance, but from the nature of the contract itself there was a portion of it which could not be executed. I said, in effect : I cannot execute this contract which is intended to be binding on both parties ; I cannot execute a portion of this contract for one, and leave the other portion of the contract unexecuted for the other ; and, therefore, as I cannot

(a) 2 Swanst. 330.

(b) 2 Dru. & War. 80.

execute the whole of the contract, I am bound to execute no part of it: that, however, has no bearing on the present case, for here I leave nothing unperformed which the Court can ever be called upon to perform.

In *Hills v. Croll*, (a) Lord LYNDHURST refused to enforce an injunction to restrain the violation of a negative covenant.¹ It was a case in which A. had given to B. a sum of money, and B. covenanted that he would buy all the acids he wanted for the manufactory of A., who covenanted that he would supply the acids, and B. also covenanted that he would buy his acids from no other person. Lord LYNDHURST refused to prohibit B. from obtaining acids from any other quarter, both because the covenants were correlative, and because he could not compel A. to supply B. with acids; and if, therefore, he had restrained B. from taking acids from any other quarter, he might have ruined him in the event of

A. breaking his affirmative covenant to supply the acids.

* 627 That case has never been rightly understood. * It is supposed that Lord LYNDHURST's decision was based upon a wrong principle; that he followed the authority of *Gervais v. Edwards* and such cases, and that he improperly applied the rule, which was in that class of cases properly applied, but under the circumstances of the case before him I think the rule was not improperly applied. (b)

(a) 2 Phil. 60.

(b) The following, containing all the material portions of Lord LYNDHURST's judgment in *Hills v. Croll*, is taken from the short-hand writer's notes, and has been kindly furnished to the reporters by one of the counsel who was engaged in that cause, and by whom a very full report of the case will be found published in "Reports of Cases in the Law of Real Property and Conveyancing," Vol. I. p. 541.

"THE LORD CHANCELLOR. — In this case of *Hills v. Croll*, Croll had obtained two patents for the purpose of purifying gas, and the result of the purification of gas was the manufacture of muriate of ammonia and sulphate of ammonia. He entered into a contract with Hills, who is the plaintiff in this suit, and the contract was to this effect. Mr. Croll was to purchase all the acids that he was to use in his process under his patent from Mr. Hills. Mr. Hills, on his side,

¹ In *Catt v. Tourle*, L. R. 4 Ch. Ap. 654, 660, Sir C. J. SELWYN, L. J., referring to the case of *Hills v. Croll*, said: "In my opinion it is very difficult to reconcile that case with *Lumley v. Wagner*, which has been repeatedly followed, and if *Hills v. Croll* is to stand with that case at all, it can only be upon its particular circumstances." See also the remarks of Sir G. M. GIFFARD, L. J., in the same case (p. 662), upon *Hills v. Croll*.

* The next case which has been so much observed upon * 628 was that, before Lord COTTENHAM, of *Dietrichsen v. Cab-*

was to have the right of purchasing all the ammonia that should be produced as the result of those processes, at certain prices as to the one and as to the other. In addition to this, there was a stipulation that, in all the licenses that were granted for using those patents, the parties to whom those licenses were to be granted should be bound to purchase all the acids which were used in the processes from Mr. Hills, and that Mr. Hills should have the same option that he had in the case of Croll, of purchasing from them all the ammonia that should be produced in the course of the processes. It was also stipulated that Mr. Hills should have the option to supply either muriatic acid or sulphuric acid, as he should think proper, regulating his option by the market prices of the muriate of ammonia and the sulphate of ammonia. I think this is the substance of the original agreement between these parties. The agreement was entered into in the month of March, 1841. It was found, on the part of Mr. Croll, that the mode of payment and other arrangements with respect to this agreement were inconvenient, in consequence of which a correspondence takes place between him and Mr. Hills, in the month of September, 1842, and the agreement was modified, according to the terms of a letter, dated, I think, in September, written by him. One of the stipulations in the original agreement was, that Mr. Hills should be a signing party in all the licenses that were granted by Mr. Croll for the use of the patent. The first stipulation, in the letter of September, was that he should not be required to be a signing party; but it provided that there should be a covenant in all those agreements, a covenant to the effect stated in the original agreement; namely, that the parties to whom the licenses were granted should purchase their acids from Hills, and give Hills the right to purchase the ammonia. Regulations were also made altering the terms on which the acids were to be purchased and the ammonia to be sold. There were some other subordinate stipulations, to which it is not necessary at present to advert. The letter, however, concluded with a stipulation to this effect, that if Mr. Croll was in any particular to depart from the agreement so modified, the original agreement was to be enforced. I think those two documents, the original agreement and the letter, formed the substance of the contract between the parties as it existed after September, 1842.

"Some doubt was expressed as to whether or not the contract so modified has been acted upon in that shape. It appears beyond all doubt that it was so acted upon, because the accounts were, from time to time, rendered on the footing of the modified agreement, and it is also clear, from the letter of Mr. Hills of the 8th of December, in which he refers expressly to the prices that were regulated by the letter of September, 1842."

His Lordship here referred to another question raised in the course of the discussion; namely, whether the second or modified agreement had been put an end to by the operation of the clause providing for the enforcement of the first or original agreement; and, after remarking that it was unnecessary for him for the purpose of the present question to come to any conclusive decision on that point, proceeded as follows:—

"Those are the facts of the case for the purpose of raising the narrow ques-

* 629 *burn.* (a) That was a very simple case, and the * question upon what principle it was decided, formed the subject of

tion, as it appears to me, which the Court has to decide. The bill was filed for the purpose of calling on the Court to declare that that agreement should be specifically performed.

"Now there is no principle of the Court which I understand to be more clearly established than this, that the Court will not decree an agreement to be specifically performed, unless it can execute the whole of the agreement. The question, therefore, in this case will be whether the Court has power, from the nature of this agreement, to execute the whole of it, every part of it. Part of the prayer which is consequent upon a specific performance is, that the defendant should be restrained from purchasing acids from anybody but Mr. Hills, and also that he should be restrained from granting licenses, except according to the agreement that was in force between the parties.

"Now then, with respect to the first of these points, there is a stipulation on the part of Hills that he will supply the acids; there is a stipulation on the part of Mr. Croll that he will purchase acids from Hills, and from no other person. Has the Court any power whatever to compel Mr. Hills to comply with that? Can the Court order Mr. Hills to continue the manufacture of acids for the purpose of supplying Mr. Croll? Can the Court call upon him, if he should not manufacture acids, and require him to purchase acids for the purpose of supplying Mr. Croll? It is clear, I apprehend, that the Court has no such power. There are cases in which the Court will do indirectly what it cannot do directly. A case commonly cited for that purpose is the case of a nuisance. The Court would not compel a party who had erected a wall to the nuisance of another, — would not compel the party by any direct order to pull down that wall; but the Court can make an order requiring him not to continue the nuisance, which would have the effect of compelling him to pull down the wall. In the case of *Morris v. Colman*, the Court restrained Mr. Colman from writing for any other theatre, inferring from that that the order would compel Mr. Colman, or have the tendency to compel Mr. Colman, to write for the Haymarket Theatre; but in this case the Court has no power to compel Mr. Hills to supply acids by ordering him not to supply acids to any other person; that is not the agreement, nor was it ever intended that it should be the agreement. Therefore, unless the Court can compel him by a direct order to supply Mr. Croll from time to time with the acids that Mr. Croll requires, it is quite clear that this Court cannot execute all the parts of this contract; the Court cannot, therefore, compel the party specifically to perform the contract.

"It was thrown out in the course of the argument, that this Court might compel one party to perform his part of the contract, and leave the other party to his remedy at law. No such principle has ever been acted on in this Court; it has been so laid down over and over again, and in a recent case that was cited at the bar (*Gervais v. Edwards*, 2 Dru. & War. 80), Sir EDWARD SUGDEN held that, unless this Court can execute every part of the contract, this Court will not compel a specific performance of a part. When this cause therefore

(a) 2 Phil. 52.

discussion before me. A man, in order to obtain a great circulation of his patent medicine, entered * into a con- * 630 tract with a vendor of such articles, giving him a general agency for the sale of the medicine, with 40 per cent discount, and stipulating that he would not supply anybody else at a larger discount than 25 per cent; he violated his contract and was proceeding to employ other agents with a larger discount than 25 per cent; an injunction was applied for and was granted: it was said that it was properly granted, because it was a case of partnership. This, however, was not the fact; it was not a case of partnership, but was strictly one of principal and agent; and it was only because there was the negative covenant that the Court gave effect to it. It is impossible to read Lord COTTENHAM's judgment without being satisfied that he did not consider it to be a partnership, * though he said it was in the nature of a * 631 partnership; and in a popular sense it might be so called, because the parties were there both dealing with respect to the same subject, from which each was to have a benefit, but in no legal sense was it a partnership.

Up to the period when *Dietrichsen v. Cabburn* (a) was decided, I apprehend that there could have been no doubt on the law as applicable to this case, except for the authority of Vice-Chancellor SHADWELL; but with great submission it appears to me that the whole of that learned Judge's authority is removed by himself by his decision in the later case of *Rolfe v. Rolfe*. (b) In that case

comes to a hearing, I am of opinion that, according to the facts as they at present stand, and according to the statement of the principle I have mentioned, this Court cannot restrain Mr. Croll from purchasing acids elsewhere, because it cannot compel Mr. Hills on his side to furnish all the acids that may be necessary for the manufacture carried on by Mr. Croll. If the Court cannot do this, it cannot restrain the parties at the hearing. It is quite clear that upon this interlocutory application the Court cannot restrain Mr. Croll from purchasing acids elsewhere. I apprehend, therefore, that the decision of the Vice-Chancellor, which proceeded on the principle I have stated, and rightly on the grounds I have stated, and which I believe is the principle of this Court, and the principle on which the Vice-Chancellor acted as to that part of the case, is correct; and equally applies, as it appears to me it does, to that part of the notice of motion with respect to the licenses, because that forms a part of the contract, the general contract. If the Court cannot execute the whole of the contract, it cannot execute the contract in part; therefore I am of opinion that in this case the motion must be refused, and refused with costs."

(a) 2 Phil. 52.

(b) 15 Sim. 88.

A., B., and C. were partners as tailors. A. and B. went out of the trade on consideration of receiving 1000*l.* each, and C. was to continue the business on his own account. A. entered into a covenant that he would not carry on the trade of a tailor which he had just sold, within certain limits, and C. entered into a covenant that he would employ A. as cutter at a certain allowance. The bill was filed simply for an injunction to prevent A. from setting up as a tailor within the prescribed limits, and the Vice-Chancellor granted that injunction. It was objected that this Court could not grant the injunction when there was something remaining to be performed, for that A. had a right to be employed as a cutter, which right this court would not even attempt to deal with or enforce as against C. That case therefore was open to a difficulty which does not occur here; in fact the same difficulty which might have arisen in *Hills v. Croll* (a) before Lord LYNDHURST. But the Vice-Chancellor held that to be no difficulty at all, observing that the bill simply asked for an injunction which he would

* 632 grant; although he could not give effect to the * affirmative covenant to do the act in respect of which no specific performance was asked: his own decisions in *Kemble v. Kean* (b) and in *Kimberley v. Jennings* (c) were pressed upon him; but he observed, "that the bills in the cases cited asked for specific performance of the agreement, and that the injunctions were sought as only ancillary to that relief; but the bill in the present case asked merely for an injunction." He no longer put it on the inability of the Court to enforce a negative covenant, but he put it on the form of the pleadings. Whether that form was sufficient to justify his opinion is a question with which I need not deal; but I am very clearly of opinion that the case of *Rolfe v. Rolfe* (d) does remove the whole weight of that learned Judge's authority on this subject.

It was said in argument that the injunction prayed in *Rolfe v. Rolfe* (d) was merely ancillary to the relief; but it will be seen that that was not so, and that the prayer extended only to the injunction, and had nothing to do with relief in the shape of specific performance; and the learned Judge himself stated that, if it had gone to that extent, he, following his former decisions, would not have granted the injunction.

(a) 2 Phil. 60.

(c) 6 Sim. 340.

(b) 6 Sim. 333.

(d) 15 Sim. 88.

From a careful examination of all these authorities I am of opinion that the principles and rules deducible from them are in direct contravention of those principles and rules which were so elaborately pressed upon me during the argument; and I wish it to be distinctly understood that I entertain no doubt whatever that the point of law has been properly decided in the Court below. It was nevertheless, and with some reason, said, that although the point of law should be decided in the * plaintiff's favour, still he might be excluded from having * 633 the benefit of it on the merits of the case.

His Lordship here entered into a minute examination of the statements in the answers and affidavits as to the unauthorized addition of the restrictive clause, and as to the non-fulfilment by the plaintiff of his portion of the agreement. In reference to those points he observed that, whether the clause was originally added with or without authority, the evidence showed a clear acquiescence on the part of the defendants to its remaining in the agreement; that the operation of the agreement had been in the first instance postponed to suit the convenience of the defendants; and that as to the payment of the 300*l.*, although the plaintiff could not have come into a Court of Equity to enforce the contract without having tendered the amount stipulated to be paid, yet it was distinctly proved that it had in fact been paid to the common agent of both parties for the purpose of being handed to the defendants. His Lordship concluded by saying that, looking at the merits and circumstances of the case, as well as at the point of law raised, he must refuse this motion with costs.

In the course of the argument, and in order to prove the plaintiff's readiness to perform his part of the contract, an affidavit made by Dr. Bacher was read, which was to the effect that he had written and sent a letter to the defendant J. Wagner, informing her of his having received from the plaintiff the 300*l.*, and offering to pay that sum according to her instructions. A letter of the same date as that referred to in the affidavit was admitted to have been received by the defendant J. Wagner, * but it was posi- * 634 tively denied that it contained any such offer. The letter itself was not forthcoming, and its non-production was not accounted for. No copy was kept by Dr. Bacher.

THE LORD CHANCELLOR observed that, when the affidavit, as to the contents of the letter, was made, Dr. Bacher could not have known that the letter would not be produced; that the affidavit, therefore, if untrue, was at the imminent peril of exposure by the production of the letter; and that under such circumstances the representation in the affidavit must be taken to be true.

1852. July 10, 12. Before the Lord Chancellor Lord ST. LEONARDS.

A testator, by his will, after appointing three persons his executors, gave to them the residue of his personal estate and directed them or other the trustees to be appointed under the provisions contained in his will to stand possessed of his residuary personal estate, upon trust at such time or times as to them should seem meet to sell and convert into money all such part thereof as should not consist of money and invest the produce in securities, and to stand possessed of the same upon trust thereout to pay his funeral expenses and debts and certain large legacies which he specified, and to stand possessed of the residue for his two sons equally; and the will contained a clause which, according to the construction put on it by the Court, empowered the trustees to give receipts. Sixteen years after the death of the testator, the then acting trustees of the will, who were not the executors, raised money upon a deposit of the title-deeds of two leasehold houses, part of the testator's residuary estate. *Held*, dismissing a claim filed by the mortgagees to enforce their securities, that, inasmuch as the trusts of the will showed a conversion out and out of the testator's property to be absolutely necessary, the trustees were not authorized in raising money by mortgage.¹

A power of sale out and out, and having an object beyond the raising of a particular charge, does not authorize a mortgage; but where the power is for raising a particular charge, and the estate is settled or devised subject to that charge, it may be proper to raise the money by mortgage, and such a mortgage will be supported as a conditional sale.

Where a trust is created by will for the payment of debts and legacies, a purchaser or mortgagee is not bound to see to the application of the money raised, the principle referable to such a case being that the testator has shown his intention to be to entrust the trustees with the power of receiving and applying the money.²

¹ Page v. Cooper, 16 Beav. 396; Robinson v. Briggs, 1 Sm. & Gif. 188; Devaynes v. Robinson, 24 Beav. 86; Sugden V. & P. (14th Eng. ed.) 396.

² See 2 Story Eq. Jur. §§ 1130 *et seq.*; Sugden V. & P. (14th Eng. ed.) 661; 2 Sugden V. & P. (7th Am. ed.) 298 [834] *et seq.* and notes; Andrews

Persons, however, who deal with trustees raising money at a considerable distance of time and without apparent reason for so doing, are under an obligation to inquire and see that no breach of trust is being committed.¹

Distinction in reference to the raising of money not apparently for the payment

v. Sparhawk, 13 Pick. 393; *Gardner v. Gardner*, 3 Mason, 178; *Wormley v. Wormley*, 8 Wheat. 421, 442, 443; *Lining v. Peyton*, 2 Desaus. 378 in note; *Colyer v. Finch*, 5 H. L. Cas. 923; *Robinson v. Lowater*, 5 De G., M. & G. 272; S. C., 17 Beav. 592; *Potter v. Gardner*, 12 Wheat. 498; *Laurens v. Lucas*, 6 Rich. Eq. 217; *Williams v. Otey*, 8 Humph. 568; *Hanser v. Shore*, 5 Ired. Eq. 357; *Lewin Trusts* (5th Eng. ed.), 336 and cases in note (a); *M'Neillie v. Acton*, 4 De G., M. & G. 744; *Farhall v. Farhall*, L. R. 7 Eq. 286; *Sorry v. Walsh*, 18 Beav. 559. In *Andrews v. Sparhawk*, 13 Pick. 393, 401, WILDE, J., said: "It has been argued that legacies are on a footing with scheduled debts, since the will shows their amount and to whom they are payable. But debts are to be first paid, and until they are paid, the application of the purchase-money cannot be made to the payment of the legacies; they cannot therefore stand on a better footing than debts not scheduled." See *Grant v. Hook*, 13 Serg. & R. 259, 262; *Bunch v. Ihrie*, 2 Rawle, 392, 417; *Sims v. Lively*, 14 B. Mon. 435; *Cadbury v. Duval*, 10 Barr, 265. In *Andrews v. Sparhawk*, at the page above given (13 Pick. 401), Mr. Justice WILDE further said: "It has been argued that there is a distinction between a devise of an estate in trust, to be sold, and an estate charged in a trustee's hands for the payment of debts and legacies. We think there is no good ground for this distinction, either in principle or upon authority. In both cases the purchaser would be subjected to the same difficulty and hazard, if he were required to see to the application of the purchase-money." And in *Gardner v. Gardner*, 3 Mason, 178, 219, 220, Mr. Justice STORY said: "Looking to the principle upon which the general doctrine is founded, I am not able to perceive any material difference between a direct trust to pay debts, and a charge upon the lands for the same purpose." "I cannot but think, that the current of authority and the analogy of the law, ought to lead us to a rejection of any such distinction, as unsatisfactory in principle, and inconvenient in practice." Mr. Greenleaf says (1 Cruise Dig. tit. 12, c. 4, § 86, note) that in the United States the English doctrine, in regard to the application of the purchase-money, has rarely been administered except in cases of fraud in which the purchaser was a coadjutor; the general rule here being, that the purchaser, who in good faith pays the purchase-money to the person authorized to sell, is not bound to look to its application; and that there is no difference in this respect between lands charged in the hands of an heir or devisee with the payment of debts, and lands devised to a trustee to be sold for that purpose. See also *Elliot v. Merryman*, 1 Lead. Cas. in Eq. (3d Am. ed.) 97 [45] *et seq.* and notes; *Duffy v. Calvert*, 6 Gill, 48; *St. Mary's Church v. Stockton*, 4 Halst. Ch. 520; *Cryden's Appeal*, 1 Jones, 72; *Clyde v. Simpson*, 4 Ohio N. S. 445, 464; *Redheimer v. Pyron*, 1 Spear Eq. 135, 141; *Champlin v. Haight*, 10 Paige, 275.

¹ See *Lewin Trusts* (5th Eng. ed.), 336, 337; *Forbes v. Peacock*, 11 Sim. 502; 12 Sim. 528; 11 M. & W. 637; *Devaynes v. Robinson*, 24 Beav. 93; *Sabin v. Heape*, 27 Beav. 553.

of a charge, between the case of a man who is owner as well as trustee, and that of a man who holds the property merely as trustee subject to a charge. Clause in a will, enabling trustees to give receipts in a particular case specified, construed, in favour of the intention of the testator, to confer a power to give receipts generally.

THIS was an appeal by the defendants from an order made on a claim, by the Vice-Chancellor KNIGHT BRUCE: the following are the facts of the case.

George Anstey, the testator, by his will dated the 1st August, 1821, after appointing Thomas Anstey, William Pearse, and James Alexander Frampton, executors, and disposing of certain parts of his personal estate as therein expressed, gave all the residue of

his personal estate unto his executors: and the testator * 636 directed * the said Thomas Anstey, William Pearse, and

James Alexander Frampton, and the survivors and survivor of them, his executors or administrators, or other the trustee or trustees to be appointed under the provision thereafter contained, to stand possessed of the residuary personal estate, upon trust at such time or times as to them should seem meet to sell and convert into money all such part thereof as should not consist of money, and invest the produce of such sale and conversion in his or their name or names upon such stocks, funds, and securities as therein mentioned; and to stand possessed of all the said stocks, funds, securities, trust-moneys, and the residuary personal estate, and the dividends, interest, and annual income thereof, upon trust thereout to pay and discharge his funeral and testamentary expenses and all his just debts, and to pay unto his wife, Judith Anstey, 100*l.* sterling within one calendar month after his death: and after giving out of his residuary personal estate an annuity of 900*l.* sterling to his wife during her life to be reduced in case of her remarriage to an annuity of 500*l.* as therein expressed, and also directing thereout the appropriation of two legacies or sums of 15,000*l.* each, 3*l.* per cent consolidated bank annuities, to be held by his trustees upon the trusts thereafter declared, the testator directed the said trustees or trustee for the time being to stand possessed of the residue and remainder of the aforesaid trust stock, funds, securities, residuary personal estates, dividends, interest, and income, in trust for his sons George Richard Anstey and Arthur Anstey in equal shares, to be assigned and transferred to them on their attaining the age of twenty-five years as therein expressed. And the will,

amongst other provisions, contained a power for the appointment when necessary of new trustees in manner therein mentioned: and the testator appointed his son the said G. R. Anstey, on his attaining his age of twenty-five years, to be a * joint trustee * 637 with the trustees for the time being of that his will, as to the trusts which should then remain unperformed.

And the will contained the following clause in reference to the trustees' receipts: " And I declare that the person or persons who from time to time shall become the purchaser or purchasers of the said house in Montague Street, and who shall pay his, her, or their purchase-money or moneys to the trustee or trustees for the time being of this my will, or who now have or hath or from time to time shall or may have all or any part of the said trust moneys subject to the bequests and trusts of this my will in his, her, or their hand or hands or upon securities to be given by him, her, or them, shall not be obliged or required to see the application of such purchase-money or moneys or any part thereof, or the application or disposition of the same moneys, stocks, funds, securities, rents, interests, dividends, or annual income thereof, or any part thereof, respectively, or after payment of the same to the person or persons who for the time being shall be the acting trustee or trustees of this my will, be answerable or accountable for the misapplication or non-application of the same money or any part thereof by him or them; and that all and every receipt or receipts which shall be given for the said purchase-moneys, trust moneys, or any part thereof, or the interest, dividends, and income of the same or any part thereof, or the rent or any part thereof, by the person or persons who for the time being shall be the acting trustee or trustees under this my will, shall be a good, effectual, and sufficient acquittance and discharge or several good, effectual, and sufficient acquittances and discharges for all and every sum and sums of money which therein and thereby respectively shall be acknowledged or expressed to be or to have been received."

* The testator died on the 22d September, 1826; and on * 638 the 31st May, 1827, his will was proved by J. A. Frampton alone, the other executors having declined to prove, and having by deed refused to act in the trusts. G. R. Anstey attained his age of twenty-five years on the 27th October, 1835, and thereupon joined with J. A. Frampton in acting as a trustee of the testator's will. J. A. Frampton died on the 28th September, 1836; and G. R.

Anstey, pursuant to the power contained in the will, appointed Campbell Wright Hobson to be a trustee of the will instead of J. A. Frampton; and all the testator's property was then duly assigned by the executor of J. A. Frampton to, and became vested in, G. R. Anstey and C. W. Hobson. G. R. Anstey died intestate on the 1st of June, 1846, having previously, on occasion of his marriage in April, 1833, settled his share of the testator's estate in trust for his children.

The widow of the testator died on the 21st September, 1844. Julia Anstey, one of the testator's daughters, married C. W. Hobson in August, 1829, and died without issue in September, 1840. The other daughter, L. J. Anstey, died, without having been married, on the 16th January, 1846. The two legacies of 15,000*l.* bank 3*l.* per cent annuities were not appropriated as directed by the will.

Part of the testator's residuary personal estate consisted of two leasehold houses, Nos. 39 and 35 Tavistock Square, St. Pancras, which the testator had contracted to purchase from Thomas Cubitt, the original lessee, but which contract was not completed at the time of his death. Subsequently, however, Thomas Cubitt duly assigned them to J. A. Frampton as sole acting executor and trustee, upon the trusts of the will. These leaseholds were not sold; but on the 16th August, 1842, G. R. Anstey

* 689 * and C. W. Hobson deposited the title-deeds relating to No.

39 with Charlotte Stroughill (then Charlotte Fry) and Emily Fry, by way of equitable mortgage and as a security for the repayment of 1800*l.* lent by C. Stroughill and E. Fry; and in November, 1842, G. R. Anstey and C. W. Hobson in like manner deposited the title-deeds relating to No. 35 with the same parties, as a security for a further advance of 1000*l.* These deposits were each accompanied by articles of agreement, in which G. R. Anstey and C. W. Hobson were described as acting trustees under the will of George Anstey: the articles recited the will, and contained a covenant by G. R. Anstey and C. W. Hobson for the repayment of the sums advanced and interest, and in the mean time to stand possessed of the premises comprised in the deeds, in trust for the said C. Stroughill and E. Fry, their executors, administrators, and assigns. The money thus advanced was raised at the instance of C. W. Hobson, under whose influence G. R. Anstey acted, and was received by C. W. Hobson alone, and applied by him to his own

purposes. C. W. Hobson continued to pay the interest on the mortgages down to the 1st November, 1847, but in May, 1848, he absconded to America.

On the 23d May, 1851, Nathaniel Stroughill and Charlotte his wife and Emily Fry filed a claim against Arthur Anstey and Robert Harrison (who by an order of the Court dated the 10th December, 1850, and made under the Acts 1 Will. 4, c. 60, and 13 & 14 Vict. c. 60, had been appointed trustees of the will of George Anstey) and the infant children of G. R. Anstey, for payment of the amount due on the mortgages, and in default for a sale of the premises. The claim alleged that the advances were made for the purposes of the testator's will.

The case came on before the Vice-Chancellor KNIGHT BRUCE on the 9th August, 1851, when his Honor made *an * 640 order in favour of the plaintiffs. From this decision the defendants now appealed to the Lord Chancellor, moving that the order might be discharged, and the claim dismissed with costs.

Mr. Malins and *Mr. T. E. Lloyd*, for the plaintiffs, supported the decree of the Vice-Chancellor. — They referred to *Forbes v. Peacock*, (a) *Johnson v. Kennett*, (b) and the authorities cited in those cases.

Mr. J. Russell and *Mr. Chandless* for the defendant Arthur Anstey, and in support of the appeal. — They referred to *Haldenby v. Spofforth*, (c) and to *Raikes v. Hall*, a case in the Exchequer before Lord ABINGER (unreported); and contended that a trust to sell out and out did not include a power to mortgage.

Mr. Glasse and *Mr. Greene* appeared for the other defendants. — They relied, as against the plaintiffs, on the distinction between a power and a trust, observing, that in the case of the former the authority to do all necessary acts was implied, but as to the latter the express directions of the deed must be adhered to.

Mr. T. E. Lloyd replied. — He referred to *Ball v. Harris* (d) as having overruled *Haldenby v. Spofforth*. (c)

(a) 11 Sim. 152; 1 Phil. 717.

(b) 6 Sim. 384; 3 M. & K. 624.

(c) 1 Beav. 390.

(d) 4 M. & C. 264.

July 12.

THE LORD CHANCELLOR. — This case, which I consider to be one of very great importance in reference to the general practice in conveyancing, arises upon the will of the late Mr. Anstey. By that will the testator gave, &c. [His Lordship stated the effect of the will as above set out.] At the end of the will there is a power to the trustees to give receipts which is rather singularly worded: [His Lordship read the clause.] The testator
 * 641 here declares * that the purchasers of the particular house mentioned shall be absolved from seeing to the application of the purchase-money, but he does not extend this declaration to the purchasers of other property; he, however, exonerates all persons who shall or may have any part of the trust moneys in their hands: but then as, in point of fact, no persons could keep the money without its being trust money in their hands, the words, though a little difficult to deal with, may I think be held as sufficient, in favour of the clear intention, to enable the Court to hold that the trustees had a general power to give discharges. That circumstance makes the case stand on a particular ground, and renders it different from the cases which have been referred to. The Vice-Chancellor, in his judgment, alludes generally to the authorities as compelling him to come to the conclusion at which he arrived; but he does not state what those authorities were. I conclude, however, that the cases cited before me were all referred to before his Honor; but it appears to me that they are distinguishable from, and do not apply to the present case.

Looking, first, at what took place subsequently to the testator's death, it appears, &c. [His Lordship here went into a history of the different events above mentioned.] It is quite clear that the legal estate in the premises in question became vested in the trustees, and that as to the power of the executor of the testator, it was entirely at an end. Mr. Hobson then appears to have prevailed on Mr. Anstey, at the end of sixteen years after the death of the testator, to join him in raising money upon these estates of the testator which were vested in the trustees, and to have used the money for his own private purposes.

As to whether the money thus raised was or not properly paid is a question I need not at present discuss: the mode,
 * 642 * however, in which the security was taken was one, which

on behalf of the plaintiffs ought not to have been accepted. The transaction was a mere agreement for securing the particular sums of money advanced, and there is nothing upon the face of either of the instruments to show that the money was advanced for the purposes of the will, except that in describing the parties to whom the advance was made, they are described as trustees. In other respects there is nothing to indicate that they were dealing with the testator's property and not their own, and they covenant, most unusually, to pay the money themselves at the end of a year from the date of the transaction. The security gave to the plaintiffs no legal estate, and was not drawn as it ought to have been if the money had been really intended for the purposes of the trust.

Under these circumstances, the money having been misapplied and Mr. Hobson having absconded, the plaintiffs assert their claim. The case is as hard a one as it is possible to imagine, and somebody must suffer; and if the rules of the Court would allow it, I should be most anxious to give effect to the decree which has been made in the plaintiffs' favour.

The first question is, whether a mortgage was or was not authorized by the trusts of this will; and in addressing myself to this point, it ought, I think, to be considered that in a case where trustees have a legal estate and are to perform a particular trust through the medium of a sale, although a direction for a sale does not properly authorize a mortgage, yet where the circumstances would justify the raising of the particular charge by a mortgage, it must be in some measure in the discretion of the Court whether it will sanction that particular mode or not. It may be the saving of an estate, and the * most discreet thing that can * 643 be done; and as the legal estate would go, and as the purposes of the trust would be satisfied, I think it impossible for the Court to lay down, that in every case of a trust for sale to raise particular sums, a mortgage might not under circumstances be justified. As a general rule, however, there can be no difficulty in saying that a mortgage under a mere trust for conversion out and out is not a due execution of that trust;¹ and looking at the nature of the property in the present case, which was leasehold, and which as being varying property would as a matter of course be directed to be converted into money where under a general gift

¹ See *Lewin Trusts* (5th Eng. ed.), 315; *Page v. Cooper*, 16 Beav. 400; *Devaynes v. Robinson*, 24 Beav. 86.

it was to go to different parties having different interests, it is impossible to say that this Court could allow the property to remain unconverted under an absolute trust for conversion out and out, and the trustees to deal with it as if it were property that was to be enjoyed in specie. In the present instance, the trustees went on receiving the rents and accounting to the persons who were entitled to the benefit of the purchase-money of the property producing the rents; and this was done where the will contained a trust that, with all convenient speed after the testator's death, the property should be converted out and out, not simply for the purpose of paying a charge, which might be more conveniently raised by a mortgage, but for the purpose of conversion. One of the objects of the conversion was to pay the debts, but there were other and final objects which rendered a conversion out and out absolutely necessary; namely, the dedication of the trust-moneys to raise particular sums according to the testator's will; and therefore to continue the property unconverted was to set aside the testator's will instead of executing the trusts of it; and if the trusts had been properly executed, the fraud which has been perpetrated could not have taken place.

* 644 * As to the authorities, the first which has been referred to, of *Mills v. Banks*, (a) arose under particular circumstances, and is easily explained; and the decision is quite right. In that case there was simply a trust under a term of years (the estate being settled subject to that term), to raise portions, and an ambiguity arose from the nature of the trust as to whether the portions were to be raised by sale or mortgage; the Court decreed a sale, and the trustees made a mortgage: the whole case was then reheard, but the real dispute was at last confined to this, whether the money ought to be raised out of the annual profits, or whether it ought to be thrown as a charge upon the corpus; and I have no hesitation in saying that the money was raised properly out of the corpus; the settlor directed large portions to be raised out of the term, and having settled his estate for other purposes, he could not intend that it should be set aside, and the annual rent received to pay the charge, and that during that time nobody should have the enjoyment of the estate, but his intention was that the charge should be borne generally by all: on the rehearing, the then Lord

(a) 3 P. W. 1; see p. 9

Chancellor was not inclined to agree with his predecessor, and though ultimately affirming the decree which had been pronounced, he makes this observation, which has been the ground of a good deal of discussion since: he says (speaking of the trusts of the term), "The trusts declared concerning the same empower the trustees to sell the premises for raising the money for the daughter of Mrs. Lutterell, and a power to sell implies a power to mortgage, which is a conditional sale." In reference to that observation, Lord LANGDALE, in delivering judgment in *Haldenby v. Spofforth*, (a) says, "This I conceive to mean, that where it is intended to preserve the estate, there, under a direction for sale, a mortgage will sufficiently answer the * purpose:" * 645 that is (as I apprehend the meaning of the learned Judge) that where the estate is to go subject to a charge, there can be no objection to raise that charge by mortgage. In *Ball v. Harris* (b) Lord COTTENHAM had also occasion to observe upon the case of *Mills v. Banks*, and he considers it as settling a general question: he says, "The third point is equally untenable; viz., that the right of the trustee to sell did not authorize the mortgage: so long ago as the case of *Mills v. Banks*, in 1724, it seems to have been assumed as settled that 'a power to sell implies a power to mortgage, which is a conditional sale;' and no case has been quoted throwing any doubt upon that proposition;" and he then shows that the case before him did not depend simply upon that. My own opinion is, that generally speaking, a power of sale, a power of sale out and out, for a purpose or with an object beyond the raising of a particular charge, does not authorize a mortgage: but that where it is for raising a particular charge and the estate itself is settled or devised subject to that charge, there it may be proper under the circumstances to raise the money by mortgage, and the Court will support it as a conditional sale, as something within the power, and as a proper mode of raising the money.¹

This point, however, is not without authority, for the precise question came before Lord LANGDALE in the case of *Haldenby v. Spofforth*, (c) already referred to. There the trustees were to sell and dispose of the testator's real estates, and such part of his personal estate as should not consist of money, and to give receipts:

(a) 1 Beav. 390; see p. 395.

(c) 1 Beav. 390.

(b) 4 M. & C. 264; see p. 267.

¹ Lewin Trusts (5th Eng. ed.), 315; Page v. Cooper, 16 Beav. 400.

seven years after the death of the testator the trustees mortgaged the property; and the Master of the Rolls held that that mortgage could not be sustained, and that it was contrary * to, and not within the trusts for sale. In a case also of *Raikes v. Hall* in the Court of Exchequer, with some papers in which I have been furnished, Lord ABINGER set aside a mortgage under somewhat similar circumstances. The testator had devised estates upon trust for sale; and at the time of his death he had an account at his bankers', on which there was a balance against him of about 5000*l.*: the executors then opened an account with the same bankers, and incurred a debt which amounted to another 5000*l.*; they then gave the bankers a mortgage for both sums: the bankers filed a bill as mortgagees to establish their claim and to have a sale; but their bill in respect of that claim was dismissed with costs: it was treated as an ordinary creditor's suit, and a common decree for sale was made, under which the bankers would come in as creditors, but not as mortgagees. I think that was quite right, because there was no power in the trustees under a trust to sell and pay debts to convert a simple contract debt of the testator to the bankers into a mortgage debt; and as to the debt which they themselves incurred, though it might be an execution of the trust, it was also a simple contract debt; and they were not justified by means of a mortgage in giving to it a different character from that in which it had been contracted. The case was, therefore, I think, rightly decided, and though it does not bear very strongly upon the one before me, yet, as far as it goes, it is an authority.

The case of *Ball v. Harris*, (a) before alluded to, depended on a different rule, and does not affect the authorities to which I have referred. There the testator first of all directed his just debts to be paid, so that the words which followed as to the rest and * 647 residue of * his estates created by implication a charge of the debts upon his real estates; he then devised his real estates to trustees in fee upon trust for certain persons successively: the trustees having mortgaged, the point raised was, whether they could make a title irrespective of the question of the debts, without the purchaser or mortgagee being bound to see to the application of the money, and whether the mortgage could be maintained.

(a) 4 M. & C. 264; see p. 268.

The Lord Chancellor maintained the mortgage upon the ground that it was not the case of a mere power to sell, but that there was a trust to raise money out of the estate to pay debts (he means by implication); and he observes, "It would indeed be most injurious to the owners of estates charged, if the trustee could effect the object of his trust only by selling the estate." This case, therefore, introduces the very proper distinction, that where there is a general trust without a mode of raising charges, or where by force of the charge itself there is an implied trust to raise it, and the estate itself is disposed of subject to that obligation (which must be a power to sell), then the charge may be raised by mortgage as well as by sale; for it is clear that in *Ball v. Harris* there was no trust to sell out and out and then to pay the debts and apply the money; but there was a devise of the estates upon trust for certain persons. after the direction to pay the debts; and there was thus a general charge which the Court construed into a power to dispose of the estates in the best manner to effect the objects of the testator. I am, therefore, of opinion in the present case upon the first point, that the trust did not authorize a mortgage, and that the equitable mortgages in question cannot be maintained.

Another and distinct line of authorities, probably those to which the Vice-Chancellor referred as compelling him to come to the decision at which he arrived, * were referred to in the * 648 argument; and the question is how far they bear upon the present case. The authorities were of this nature; they were cases in which, there being a charge and no provision or declaration that the trustees' receipts should be discharges, purchasers or mortgagees were held to be absolved from looking to the application of the money, by the circumstance that legacies only were not charged, but that debts and legacies were charged. In reference to this a difference of opinion existed between the late Vice-Chancellor of England and Lord LYNDHURST. The first case to which it is necessary to refer is *Watkins v. Cheek*; (a) and it establishes a rule with which I find no fault; namely, that if the party raising money is himself also the owner of the property as well as trustee, and he is not raising money for the payment of the obligation with which the property is charged, there the purchaser or mortgagee

(a) 2 S. & S. 199.

may not be bound to see to the application; but if it expressly appears that a man who is not the owner, having got property subject to a charge, is selling or mortgaging not for that purpose (as the Vice-Chancellor in *Watkins v. Cheek* thought it appeared that he was), then the case would be the same as that of an executor mortgaging or selling under circumstances raising a fair presumption that he was acting only for his own benefit, and consequently such a proceeding would not be deemed a good execution of the trust so as to absolve the purchaser from seeing to the application of the money.

The next case, *Johnson v. Kennett*, (a) is very simple. By the will certain legacies were given, and subject to those legacies and the payment of his debts and funeral and testamentary expenses, the testator gave all his real and personal estate to his son * 649 in fee. Here then the * son was a trustee for the payment of legacies and debts, but he was likewise (subject to those debts) the owner, and therefore he would always in his dealings with the estate fill the two characters. The son settled the estate to uses as if it was his own property, and then raised money by the sale of the estate: bonds of indemnity were taken against the legacies, some of them general bonds; and the question was whether the sale could be maintained. The Vice-Chancellor was of opinion that it could not, and he went upon the ground that the man was dealing with the property as his own, and that therefore it could not be supposed it was an execution of the trust for payment of the debts. Lord LYNDHURST reversed that decision, (b) and upon a ground not altogether, I think, satisfactory: he puts it thus: "But it is said that the debts having been paid, and paid out of the personal estate, and nothing remaining but the legacies, the case falls within the general rule applicable to cases when legacies alone are charged upon the real estate;" thus making the decision below to turn upon this, that although there was an original charge of debts and legacies, yet, as the debts had been paid and the legacies alone remained charged, the case came within the rule that the purchaser is bound to see to the application of the money for payment of legacies. The learned Judge, in answer to that, said, "I find no authority for such a proposition: the rule applies to the state of things at the death of the testator; and if the debts

(a) 6 Sim. 384.

(b) 3 M. & K. 624; see p. 631.

are afterwards paid, and the legacies alone are left as a charge, that circumstance does not vary the general rule." Though I see that as counsel I had to argue the other way, I apprehend that the purchaser had a good title, but not upon the ground just stated. The son being absolute owner of the estate, subject to the * debts and legacies, was at liberty to settle it to uses for * 650 himself just as he thought proper, and when he sold, he sold as owner as well as trustee, and a sale was no breach of trust; it was a sale by him in his proper character, but still subject in equity to the payment of the debts and legacies. He stood in the same situation as an heir-at-law, who, being liable to the testator's debts, has power to dispose of the estate by sale, if he thinks proper, but is bound to apply the money that he receives from the sale in payment and satisfaction of the debts, and this Court will compel him to do so, and will not allow him to divert the money to other purposes. I apprehend, therefore, that in such a case, without resorting to any rule like that to which Lord LYNDBURST resorted, there was a perfectly good title in the purchaser.

The next case, *Page v. Adam*, (a) very much resembles the last, but there debts were actually due at the time of the sale. The testator made his will, and gave the property subject to the payment of debts, legacies, and annuities; and the question raised, probably for the first time, was, whether the purchaser took subject to the annuity: the Master of the Rolls decided, I think very properly, that he did not, and that the sale was good against the annuity: there being a general charge, he considered that the purchaser was perfectly safe, and he did not think right to follow the decision of the Vice-Chancellor.

The Vice-Chancellor had also before him another case, *Forbes v. Peacock*, (b) (and here I may say with regard to these particular decisions of that learned Judge, that, at the time he gave them, the general feeling of the profession was undoubtedly in favour of the view which he took): there the testator directed that his debts should * be paid, and he gave the estate to his * 651 wife for life subject to his debts and certain legacies, and he gave her power to sell it if she thought proper in her lifetime; and after stating what was to be done with the money, he directed that if the estate was not sold in her lifetime it should be sold at

(a) 4 Beav. 269.

(b) 11 Sim. 152.

her death: the widow lived twenty-five years after her husband's death, and did not sell the estate, and the estate became salable upon her death: this is a circumstance to be noted, for it was not the case of an executor selling at the end of twenty-five years without any reason for doing so, but it was a clear execution of the trust, that trust being properly held by the Vice-Chancellor to be in the executor. The matter came before him again after he had overruled a demurrer which had been filed to the bill, and he then refused to sustain the purchase, being of opinion that, under the circumstances, the purchaser must be taken to have known that there was an outstanding charge: he considered that *Page v. Adam* was an authority against him, but he could not acquiesce in it. The case came on appeal before Lord LYNDHURST, who was of opinion against the Vice-Chancellor, and reversed the decision. (a) In doing this he admits, what I have already stated, that if the purchaser had notice that the vendor intended to commit a breach of trust and was selling the estate for that purpose, he would, by purchasing under such circumstances, be concurring in the breach of trust and thereby become responsible; and then he makes this observation: "But assuming that the facts relied upon in this case, amount to notice that the debts had been paid, yet, as the executor had authority to sell not only for the payment of debts, but also for the purpose of distribution among the residuary legatees, this would not afford any inference that the executor

* 652 was committing a breach of * trust in selling the estate, or that he was not performing what his duty required. The case then comes to this: if authority is given to sell for the payment of debts and legacies, and the purchaser knows that the debts are paid, is he bound to see to the application of the purchase-money? I apprehend not. In the case of *Johnson v. Kennett*, where it was contended that the rule did not apply, because the debts had been paid before the sale took place, I held that the rule had reference to the death of the testator, and therefore that, even supposing the debts were paid before the sale took place, and that the legacies alone remained as a charge, that circumstance would not vary the general rule." There is a note by the reporter, in which he says: "If, notwithstanding this decision, it should still be inferred from the terms of the dictum in *Johnson v. Ken-*

(a) 1 Phil. 717; see p. 721.

nett, that the rule would not apply to a case in which it should happen that there were no debts due at the testator's death, and that the purchaser knew it, I have the authority of Lord LYNDHURST for stating that he did not intend on that occasion to lay down any rule which should govern such a case; and that the guarded and somewhat qualified terms in which the dictum is referred to and adopted in this case were used for the express purpose of excluding that inference." I cannot, however, think that a satisfactory settlement of this important point. The difference is this: Lord LYNDHURST represents the Vice-Chancellor as saying that if there be a general charge of debts and legacies, the purchaser is absolved from seeing to the payment of legacies on account of the charge of debts, but if the charge of debts has been satisfied, and the purchaser knows it has been satisfied, he is then in the same situation as if there was only an original charge of legacies, and he is bound to see to the application of the purchase-money; but to this Lord LYNDHURST answers that the rule is different, and that if there is a general * charge of * 653 debts, the case must be taken as it stood at the death of the testator, and if there were debts then, although they were afterwards satisfied, the purchaser is not liable: then he says, as I understand by the note, that he did not mean to decide that if there were no debts at the death of the testator, the purchaser was not bound. I cannot, however, follow that distinction. The case must stand upon one of two grounds: either that there are no debts within the knowledge of the purchaser, and then it is indifferent whether there were no debts at the death of the testator, or no debts at the time of the purchase, or, which is more satisfactory and open to no ambiguity, on the ground that when a testator, by his will, charges his estate with debts and legacies, he shows that he means to intrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them. It is by implication a declaration by the testator that he intends to intrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee: that intention does not cease because there are no debts; it remains just as much if there are no debts as if there are debts, because the power arises from the circumstance that the debts are provided for, there being in the very creation of the trust a clear indication amounting to a decla-

ration by the testator that he means, and the nature of the trust shows that he means, that the trustees are alone to receive the money and apply it. In that way all the cases are reconcilable, and all stand upon one footing; namely, that if a trust be created for the payment of debts and legacies, the purchaser or mortgagee shall in no case be bound to see to the application of the money raised. This would be a consistent rule on which everybody would be able to act, authorized, too, by the words of the * 654 testator, and drawing * none of those fine distinctions which embarrass Courts and counsel, and lead to litigation; and it is one to which I shall adhere as long as I sit in this Court.¹

The cases, however, which I have been considering do not, in my opinion, apply to the case before me: they were referred to, no doubt, as showing that at a considerable distance of time a mortgage or sale has been upheld under trusts of this nature, but they do not bear out that proposition: they stand upon distinct grounds. In *Johnson v. Kennett*, there was an actual gift of the property to the person subject to the trust, and I have already explained my view of that decision: in such a case as that, the purchase-money could not be followed in the hands of the purchaser or mortgagee. The other cases depend upon a totally different point; namely, the intention to confer the right to give receipts, and certainly they do not touch the present question, and as to *Forbes v. Peacock*, it is quite a mistake to suppose that that was a trust executed at a distance of twenty-five years from the time when it arose, for it was executed at the time at which it did arise, which happened to be twenty-five years after the death of the testator.

I will only add, in regard to the general question of distance of time, that people who deal with trustees raising money at a considerable distance of time and without an apparent reason for so doing, must be considered as under some obligation to inquire and to look fairly at what they are about. I do not thus mean to incumber or to lessen the security of purchasers or mortgagees under trusts; but if for a great number of years a trust, such as that here, remains unperformed, and parties are found in possession and receipt of the rents of the trust property, and then an application is made of it without their concurrence by the

¹ *Andrews v. Sparhawk*, 13 Pick. 393; *Grant v. Hook*, 13 Serg. & R. 259, 262; *Cadbury v. Duval*, 10 Barr, 265; *Sims v. Lively*, 14 B. Mon. 435.

trustees, it may place * those who deal with the trustees in * 655 a situation of having it established that there was a breach of trust, of which they ought to have taken notice. So far, however, from wishing it to be supposed that any thing which now falls from me is to lessen the security or safety of persons who are purchasers or mortgagees under ordinary circumstances, I am endeavouring to lay down a rule to make them more secure than perhaps they have hitherto been.

Unhappily for the present plaintiffs, there is no authority that I am aware of in favour of the transaction which they are seeking to sustain; and it is not therefore possible for me to affirm the decree of the Court below. I must set aside the mortgages, declaring them to be invalid, and to be no charges upon the property; and strictly I ought to dismiss the claim with costs, but considering the great hardship of the case, I shall not do so.

Some discussion then took place in reference to the costs, and as to the delivery up, by the plaintiffs, of the title-deeds of the premises.

THE LORD CHANCELLOR finally directed, with a view to save further litigation, that the plaintiffs should deliver up the title-deeds, but not the articles of agreement; and that on this being done, the defendants should pay the costs of the hearing in the Court below, and that there should be no costs of the appeal.

* REYNELL v. SPRYE.¹

* 656

SPRYE v. REYNELL.

1851. November 20. Before the LORDS JUSTICES.

Upon a motion for production of documents in the defendant's custody, the Court will not receive evidence extraneous to the answer, to show that a particular document had been fraudulently omitted from the schedule, although the defendant does not object to the admission of the extrinsic evidence, and has adduced evidence to contradict it.*

¹ S. C., 15 Jur. 1046.

* See *Adams v. Lloyd*, 3 H. & N. 351; 2 Dan. Ch. Pr. (4th Am. ed.) 1823, 1824. But the party from whom production is sought may be required to make

THESE were an original and supplemental suit, and corresponding cross suits, on which an appeal was pending from a decree of Vice-Chancellor WIGRAM. The circumstances out of which the suits arose may be collected from the report of the case upon the appeal which immediately follows this report.

A motion was now made on behalf of the plaintiff in the cross suits, that the defendants in those suits might produce the several deeds, papers, and writings admitted by their answers and the schedules thereto, to be in the defendants' possession, custody, or power, including therein certain copies of letters specified in the notice of motion, and also the instructions to the counsel of the defendants to amend the original bill, together with all other instructions laid by the defendants' solicitors before their counsel, for the preparation of the original bill in the first above-mentioned cause, and for the preparation of his answers to the cross bills, and all other instructions laid by them before their said counsel. The motion also sought leave to file a supplemental bill.

The motion was supported by affidavits, including one made by a clerk of a law stationer employed by the defendants' solicitors, which (if true) showed that there had been omitted from the schedule to the answer in the cross suit certain instructions to the defendants' counsel, and that from these instruments it would appear that an opinion of counsel had been communicated * 657 to the * plaintiff in the original suit before July, 1843, a fact on the supposed absence of which the judgment in the Court below mainly turned.

In opposition to the motion, affidavits were also filed. The allegations in the affidavits on the two sides were in direct conflict.

The Solicitor-General, Mr. Bethell and Mr. T. H. Terrell, in support of the motion, were desired by the Court to assume for the purpose of the argument, the truth of the affidavits on which they relied, and upon that hypothesis to show, that according to the practice of the Court it could make an order for production. They then contended, that where a defendant has been allowed to a further affidavit, stating specifically whether he has or has had a particular document in his possession, and what he has done with it. *Richards v. Watkins*, 6 Jur. N. S. 168, V. C. W.; *Willett v. Thiselton*, 1 N. R. 42, M. R.; *Noel v. Noel*, 1 De G., J. & S. 468; 9 Jur. N. S. 589; *Westminster and Brymbo Colliery Co. v. Clayton*, 12 W. R. 123, V. C. W.; 2 Dan. Ch. Pr. (4th Am. ed.) 1824.

seal up parts of documents upon affidavit, it is competent to the plaintiff to show that the affidavit is untrue, and to have the seal removed; and they argued that this was the same case in principle.

They cited *Bowes v. Fernie*. (a)

Sir F. Kelly, Mr. Lloyd, and Mr. Shapter, for the defendants, said that it was the earnest desire of their clients that the whole of the matter should be before the Court.

THE LORD JUSTICE KNIGHT BRUCE. — In this cause, which is a suit by bill and cross bill between Sir Thomas Reynell, now deceased, and Lady Elizabeth Reynell on one side, and on the other a gentleman named Sprye and his wife, to say nothing of any formal or immaterial party, a decree has been obtained by Sir Thomas, or Lady Elizabeth Reynell, against * which, Cap- * 658 tain and Mrs. Sprye have by way of petition of rehearing appealed, and the present motion proceeds on grounds which, for the purpose of the argument, have been assumed to be true, and of course for that purpose only. It is said that, a discovery of documents having been required by the bill of Captain and Mrs. Sprye, that discovery was so given by Sir Thomas Reynell, as not to include a case and opinion or a copy of a case and opinion, it being clear that the schedule ought to have included that document if it was in the possession or power of Sir Thomas Reynell or his solicitors. The case alleged and assumed for the purpose of the argument is, that the answer was in that respect untrue; that the document was in truth, at the time, in the possession of Sir Thomas Reynell or his solicitor, but that it was unfairly and dishonestly concealed by Sir Thomas Reynell, and that he was knowingly assisted in that unfair and dishonest conduct by his solicitors; and upon this ground it is sought to obtain an order in the present stage of the cause, to compel the production. We are of opinion that it is not competent to the Court to make an order of this description without laying down, and in fact creating, a new system of practice and procedure. If the alleged facts are true, and there is any course open to Captain and Mrs. Sprye on

the subject, — as to which we give no opinion, — the course to be taken must, we suppose, be either a criminal proceeding or a proceeding in the nature of a criminal proceeding, which this is not, or a new bill either supplemental or of some other kind, as to which our leave is not, we apprehend, necessary. This motion, therefore, must so far be refused.

With regard to certain other documents, seven letters or copies of letters, there is a total absence of admission that any one of them is or at the time of putting in the answer was in the
 * 659 possession or power of Sir Thomas * Reynell or of his solicitors. When I say that there is no admission, I do not forget the inchoate and incomplete admission as to some of those seven documents which was made or intended to be made, but which is said to have been made or intended by mistake, and which we cannot now at least decide not to have been so. As to the rest of the documents, the production of them being consented to, there is no occasion to say more.

The Lord Justice Lord CRANWORTH concurred.

The order was, that Captain Sprye should pay to Lady Elizabeth Reynell and Messrs. Walker and Grant, all the costs of the motion; that certain documents agreed upon should be produced; and by the consent of Lady Elizabeth Reynell, it was ordered that Captain and Mrs. Sprye should be at liberty within two months to file such supplemental bill, in the nature of a bill of review, as they might be advised, upon depositing 50*l.* with the registrar.

* 660

* REYNELL *v.* SPRYE.SPRYE *v.* REYNELL.

1852. January 17, 19, 20, 26, 27, 28, 31. February 2. March 15. Before the LORDS JUSTICES.

1. Where A., having a right which was supposed to be of uncertain extent, likely to be resisted or questioned, and not susceptible immediately or easily of proof, and B. undertook the ascertainment and establishment of this right, on the terms of the expenditure for the purpose being his, and of his having

half the benefit of what should be so obtained. *Held*, that such an agreement (whether it amounted strictly in point of law to champerty or maintenance so as to constitute a punishable offence or not) must be considered against the policy of the law, mischievous, and such as a Court of Equity ought to discourage and relieve against.¹

2. Where one contracting party has intentionally misled the other, by describing his rights as being different from what he knew them really to be, it is no answer to the charge of fraud to say, that the party alleged to be guilty of it recommended the other to take advice, or even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defence to the other.²
3. Where one of the parties to a negotiation induces the other to contract on the faith of representations any one of which has been untrue, the whole contract is to be considered as having been obtained fraudulently,³ nor is the case varied by the circumstance that the untrue representation was in the first instance the result of innocent error, if, after the discovery of the error, the party who made the representation suffer the other to continue in that error.
4. Where the parties to a contract against public policy, or illegal, are not in *pari delicto*, and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him.⁴
5. Where relief in equity is sought against a person alleged to have obtained an instrument by fraud, or otherwise improperly from the plaintiff for the benefit of the defendant, and the facts alleged as constituting or showing the fraud or impropriety are proved against him, and do constitute or show the fraud or impropriety, the suit will not fail, because the bill may have incorrectly and untruly alleged a third person to have been a participator and joint

¹ *Strange v. Brennan*, 15 Sim. 346; *Earle v. Hopwood*, 9 C. B., N. S. 566; 7 Jur. N. S. 775; 9 W. R. 272; *Grell v. Levey*, 16 C. B., N. S. 73; 12 W. R. 378; *Sprye v. Porter*, 7 Ell. & Bl. 58; 3 Jur. N. S. 330; *Knight v. Bowyer*, 2 De G. & J. 421; *Arden v. Patterson*, 5 John. Ch. 44; *Thurston v. Percival*, 1 Pick. 415; *Holloway v. Lowe*, 7 Porter, 488; *Wilhite v. Roberts*, 4 Dana, 172; *Cardwell v. Sprigg*, 7 Dana, 86; *Bryant v. Hill*, 9 Dana, 67; *Slade v. Rhodes*, 2 Dev. & Bat. Eq. 24; *Key v. Vattier*, 1 Ham. 132; *Brown v. Beauchamp*, 5 Monroe, 416; 2 Story Eq. Jur. §§ 1048 *et seq.*; *Thalimer v. Brinckerhoff*, 20 John. 386; *Martin v. Veeder*, 20 Wis. 466; *Hilton v. Woods*, L. R. 4 Eq. 432; *Dorwin v. Smith*, 35 Vt. 69; *Coquillard v. Bearss*, 21 Ind. 479.

² See *Prescott v. Wright*, 4 Gray, 461; *Chitty Contr.* (10th Am. ed.) 751, note (g) and cases cited, 752; *Russell v. Branham*, 8 Black. 277.

³ See *Chitty Contr.* (10th Am. ed.) 754.

⁴ See *Chitty Contr.* (10th Am. ed.) 732; *White v. Franklin Bank*, 22 Pick. 186; *Lowell v. Boston and Lowell R.R. Co.*, 23 Pick. 32; *Tracy v. Talmage*, 4 Kernan (N. Y.), 162; *Curtis v. Leavitt*, 1 Smith (N. Y.), 9; *Prescott v. Norris*, 32 N. H. 101

actor in the facts, although such an incorrect mode of stating the case may affect the costs.

6. Where the Court below has by decree given substantial relief against a defendant, with costs against him personally, it is competent to the Court of appeal affirming the decree as to the relief, to vary it as to the costs; but to render this course correct, there ought to be a judicial dissent as to the costs, strong, clear, and undoubting.¹
7. At the hearing an injunction may be granted although not prayed for by the bill.²

THIS was an appeal from the decision of Sir JAMES WIGRAM, reported in the eighth volume of Mr. Hare's Reports, p. 222.

The facts appear sufficiently from that report and from the judgments.

* 661 * *The Solicitor-General, Mr. Bethell, and Mr. T. H. Terrell* supported the appeal.

Sir F. Kelly, Mr. Lloyd, and Mr. Shapter were for the respondents.

Upon the question of champerty were cited *Strachan v. Brandon*, (a) *Wood v. Downes*, (b) *Harrington v. Long*, (c) *Hunter v. Daniel*, (d) and cases there cited; *Hartley v. Russell*, (e) *Williams v. Protheroe*, (g) *Hawkins's Pleas of the Crown*, 456, *Stanley v. Jones*, (h) *Cholmondely v. Clinton*. (i) As to affording relief at the instance of *particeps criminis*, *Cecil v. Butcher*, (k) *Brackenbury v. Brackenbury*, (l) *Osborne v. Williams*, (m) *Lord St. John v. Lady St. John*, (n) *Benyon v. Nettleyard*. (o) Upon the frame of the suit, *Ferraby v. Hobson*, (p) *Wilde v. Gibson*, (q) *Archbold v. Commissioners of Charitable Bequests*, (r) *Bellamy v. Sabine*. (s)

THE LORD JUSTICE KNIGHT BRUCE. — In these causes the original

(a) 1 Eden, 303.

(b) 18 Ves. 120.

(c) 2 M. & K. 590.

(d) 4 Hare, 428.

(e) 2 Sim. & Stu. 244.

(g) 5 Bing. 309.

(h) 7 Bing. 369.

(i) 4 Bli. 4 & 90.

(k) 2 Jac. & W. 565.

¹ 2 Dan. Ch. Pr. (4th Am. ed.) 1466; *Power v. Reeves*, 10 H. L. Cas. 645.

² 1 Dan. Ch. Pr. (4th Am. ed.) 388; 2 ib. 1614, 1682.

(l) *Ib.* 391.

(m) 18 Ves. 379.

(n) 11 Ves. 535.

(o) 3 Mac. & G. 94.

(p) 2 Phill. 255.

(q) 1 H. L. Cas. 605.

(r) 2 H. L. Cas. 440.

(s) 2 Phill. 425.

plaintiff, Lieutenant-General Sir Thomas Reynell, sought, and after his death, Lady Elizabeth Reynell, as his devisee and executrix, obtained from a learned Judge of this Court, not now on the bench, relief against two instruments as affected in equity by unfair or improper dealing alleged to have taken place on the part of Captain Sprye, who, with Mrs. Sprye his wife, claimed the benefit of those instruments, * their alleged rights * 662 under which they by their suit sought, but in the opinion of the Vice-Chancellor, who dismissed their bill, were not entitled, to enforce.

[After describing generally the nature of the impeached documents, which are set out in Mr. Hare's report, his Lordship continued:]

The case brought before us upon a petition of appeal or rehearing, presented by Captain and Mrs. Sprye in each of the causes, occupied here, as it had done before Sir JAMES WIGRAM, a length of time fully commensurate to its bulky materials and to the demands of justice. The present is one of those instances of cross litigation, in which a dismissal of each of the contending parties is incapable of terminating the dispute between them, for that course taken here would leave Captain Sprye at liberty to sue Lady Elizabeth Reynell (whether without or with a reasonable chance of success) for the purpose of recovering against the assets of Sir Thomas Reynell pecuniary damages (substantial or nominal) upon the agreement of 1844, and a covenant contained in the conveyance of 1843. It is therefore necessary, not only with respect to the costs, but also otherwise, to determine whether relief ought to be given upon the bill filed by Sir Thomas Reynell.

Whatever may become of the suit of Sir Thomas Reynell, I apprehend that if we shall dismiss or affirm the dismissal of the bills filed by Captain and Mrs. Sprye, that will amount to an adjudication that the two instruments in question (of which, if either confers any title at law, it is only a title to sue for pecuniary damages, inasmuch as Mr. Henry Reynell's interest in his real property was equitable only) confer in equity, either no title at all, or nothing beyond a title to proceed against Sir Thomas Reynell's assets for the recovery of pecuniary damages;

* while it is obvious that the success of Captain and Mrs. * 663

Sprye in their suit must be destructive of Sir Thomas Reynell's suit, which, on the other hand, cannot succeed without causing the total failure of the other. But there would be nothing absurd or anomalous in a dismissal of each of the bills; and as in most instances, so especially in this, the attack on each side requires a more forcible and clear case than the defence.

I have but another word in the nature of a preliminary observation to say, which is this: upon the assumption of the decree being right, so far as it goes, it might well, I think, have restrained Captain Sprye in terms from suing Lady Elizabeth Reynell at law upon the two instruments respectively, an addition which I suppose that the Vice-Chancellor, if asked to make, would have made; for though an injunction of that kind is not, I believe, prayed on the record, the omission was, I apprehend, at the hearing of the causes immaterial, whatever the rule may be as to interlocutory applications. The decree would, perhaps, have also contained provisions concerning some other documents in evidence if this had been asked at the bar.

And now as to the merits, my remarks on which may be prefaced usefully, by reading the two impeached instruments.

[His Lordship read the documents, which were a deed of July 15, 1843, and a letter of May 14, 1844, both of which are set out in the report above referred to.]

As to the origin of these documents, it seems that in or before April of the year 1843, Captain Sprye, perhaps in the course of some genealogical inquiries, perhaps otherwise, did without any request from Sir Thomas * Reynell or employment on his part, discover, or hear of the fact, that Mr. Henry Reynell had left a will, conferring reversionary interests in real property, on Sir Thomas Reynell and his elder brother, Sir Richard Reynell, which was proved, and deposited at Doctors' Commons. It must also be taken that Captain Sprye, in a manner open to some remark, did, between the end of March, 1843, and the end of June, 1843, communicate the fact of the existence of the will to Sir Thomas Reynell, and inform him that he was, or might possibly be, either under it if valid, or by heirship, interested importantly in the landed property of Mr. Henry Reynell, property of considerable value. It may moreover fairly be considered as true, that Sir

Thomas Reynell, though he had been acquainted slightly at least with that gentleman, and aware of a relationship between them, had, previously to receiving this information from Captain Sprye, neither cared nor thought whether Mr. Henry Reynell had left will or property. Now, that possibly but for Captain Sprye, the life of Sir Thomas Reynell might have ended without any attention upon his part having been given to any such matter, that possibly but for Captain Sprye it might at this moment have been unknown to Lady Elizabeth Reynell, that Mr. Henry Reynell left either will or property; and that but for Captain Sprye, possibly Mr. Williams Reynell might now have been receiving and enjoying the rents of the estates—a possession which not very improbably might have continued until his death—there is, I think, no gainsaying.

And inasmuch as the estates in question may be taken to be worth not less than 25,000*l.* clear after discharging the burdens upon them,—as, at the time when the communication was made by Captain Sprye to Sir Thomas Reynell, the true and real title to the estates was, for all purposes material in the present case, thus: * that Mrs. Williams Reynell was tenant for. * 665 life, subject to impeachment of waste, with remainder or reversion (immediately in substance) to Sir Thomas Reynell in fee—as some timber had been cut irregularly—as some colour had been given for an unfounded claim on the part of Mr. Williams Reynell, to an interest for his own life—and as there was at least probable ground for questioning the propriety of the conduct of Mr. and Mrs. Williams Reynell, and Mr. Monro, and Mr. Thomas Williams, the trustees, or supposed trustees under the will, or of one or more of them, in having omitted to inform Sir Thomas Reynell of the will, and in having dealt somewhat singularly with the paper under which that unfounded claim arose,—it cannot, I think, be denied, that Captain Sprye, by merely telling Sir Thomas Reynell of the existence and nature of the will and of its place of deposit, did or might have done a valuable act of service to him. This service Captain Sprye might have rendered in several ways; as, for instance, he might have said to Sir Thomas Reynell, “I am glad to be able to inform you of a circumstance that you are possibly not aware of—your kinsman Mr. Henry Reynell, of Leatherhead, left a will, under which some important interests in landed property appear to be given reversionarily to you and to Sir Richard Reynell—had you not better look after the matter?

the will is at Doctors' Commons." Now if Captain Sprye, on becoming aware of the will and its place of deposit (a notorious and sufficiently accessible place), had taken this course without any bargain or other motive than the wish to do as he would be done by, or to perform an act of mere good nature or courtesy to a respectable acquaintance — (I say nothing of their common profession, or of Sir Thomas Reynell's age, services, and station) — Captain Sprye would have acted as, I hope, three out of four

men in this country similarly circumstanced would have

* 666 acted. Or * it might have been thus: I have more

than once, as probably many others have, received letters proposing to furnish some unexplained information alleged to be of an advantageous kind, in exchange for a preliminary coin, I think a sovereign, upon the safe transmission of which, but not before, the mystery was to be unfolded. If Captain Sprye, taking such a course, had, before giving any information, required and received a promise from Sir Thomas Reynell that he would, upon learning something beneficial to him from the Captain, give the Captain half, or a quarter, or an eighth, of the value of what the information should enable or lead Sir Thomas Reynell to obtain, it may be that a jury would in an action of assumpsit, upon the promise, have given the Captain pecuniary damages, and that the verdict would not have been disturbed; but I do not think it likely that a Court of Equity would have assisted such a transaction beyond not refusing to recognize as an effectual judgment for damages, or damages and costs, a judgment at law obtained fairly in such an action. Again: Captain Sprye might have withheld the information from Sir Thomas Reynell, until the latter had promised him a fair or sufficient compensation or reward in general terms for the communication. This certainly would have been a contract merely of legal cognizance, but if a judgment at law for damages, or damages and costs, had been obtained by Captain Sprye upon it fairly, a Court of Equity would have recognized that as an effectual judgment for its proper legal purpose.

I have used the expression "valuable act of service;" the worth and extent, however, of that act, of that service, should of course be neither over-rated nor under-rated. The title and claim of Mrs. Williams Reynell and her husband were merely and solely under

the will. It was of the utmost importance to their interest

* 667 that * the will should be held valid and effectual; nor has

it been shown or suggested that either of them at any time denied or questioned, or thought of denying or questioning, its existence or validity. They desired, indeed, perhaps fairly, perhaps unfairly, but certainly without any foundation, to give testamentary validity as concerning the freehold property to an invalid paper — (a paper at least invalid as to the testator's freehold property — and he does not seem to have had any copyhold property) — a paper the sole effect of which, if valid as to freehold estate, would through the execution by Mrs. Williams Reynell of the power that it purported to give, had been to confer a life interest on her husband. This wish, however, must have increased rather than diminished their inclination to support the will, which in fact is safe at Doctors' Commons, and has continually been so for the last twenty-five years and more, including as part of it the paper professing to give the power just referred to, though, as I have said, that paper was at least as to the freehold estate not truly part of it; nor am I satisfied upon the evidence that it would be right to impute to Mr. Monro, or to Mr. Thomas Williams, the trustees, or alleged trustees, who had been before the year 1830 appointed, or nominally or apparently appointed, in the place of Mr. Trower and Mr. Walker, any wrong intention at any time. That Mr. Monro and Mr. Thomas Williams acted with uniform correctness I do not say.

Mr. Henry Reynell's title-deeds I believe were at his death, and have ever since been, held by none of the persons whom I have mentioned, but by a mortgagee under a mortgage, created I think by Mr. Henry Reynell, which seems to be still unsatisfied, and by reason of that incumbrance the legal estate in fee in the property in question, as I collect, was at the time of the making of the will, and has ever since been outstanding. The will * speaks * 668 of "the moneys secured on my estates in the counties of Devon and Somerset, in mortgage to Mr. John Beague," and of "the said mortgage money due to the said John Beague." The testator describes himself in it as Henry Reynell, of Leatherhead, and it seems highly probable that many persons at Leatherhead, and some, if not all, of the occupying tenants of the property, were aware or had heard long before the year 1843, that Mrs. Williams Reynell was not legitimate, and was entitled under the will of her reputed father, Mr. Henry Reynell, of Leatherhead, to the real estate of which she and her husband were in the enjoyment. Upon

the whole, if Captain Sprye at any period of the year 1843 thought it likely that, without and independently of any aid, interference, or communication upon his part, Sir Thomas Reynell and his heir or devisee, if any, would remain for ever or for so long a period as a twelvemonth, after the death of the survivor of Mrs. Williams Reynell and her husband, ignorant of the existence, nature, or contents of Mr. Henry Reynell's will, that opinion so entertained by Captain Sprye was, in my judgment, founded on wrong calculations of chances and of probabilities, and in error.

But let us suppose that Captain Sprye, acting gratuitously, had merely taken the first line that I have mentioned, and then left Sir Thomas Reynell to himself. In what manner would Sir Thomas Reynell, if assumed to have had ordinary prudence or common discretion, have acted? He would have resorted to a competent solicitor, a man of consideration and experience; and accordingly, if not then knowing one of that description, would have procured some judicious friend to recommend him one. To this solicitor he would have stated the matter. The solicitor would have inspected

the original will, and have bespoken and obtained a copy of

* 669 it, and have learnt * from Sir Thomas Reynell the state of

his family, including the probability that Sir Richard Reynell, who certainly survived Mr. Henry Reynell, had died intestate, leaving Sir Thomas the heir of Sir Richard. The solicitor then would have made inquiries at Leatherhead and elsewhere, and would very easily and soon have ascertained the place of residence of Mr. and Mrs. Williams Reynell, and the fact that she had never had, nor was likely to have, a child; he would also have guessed at least that an attempt would be made to gain a life interest in the property for her husband, but would of course have felt perfectly satisfied that the attempt could not succeed, for the mere inspection of the will would have shown that though its validity as to freehold property was probable in the highest degree, except as to the paper under which alone a life interest could be claimed by him, that paper was clearly of no value as to freehold estate. The solicitor would have also felt convinced that Mrs. Williams Reynell, was neither heiress nor co-heiress of Mr. Henry Reynell, and that she and her husband in all probability considered it most desirable for each, most material and important for the interests of each, that the will, whether without or with the unattested paper, should be supported as a good will

of all the testator's property. The solicitor, having thus informed himself, which he would have done at a small expense, would then have applied by letter or personally in a civil and business-like manner to one of them, and so have learned the name, abode, and calling of Mr. Monro, and his connection or former connection with the property. But it must be recollected also that Mr. Monro is a deponent, or was intended to be a deponent, in the affidavit deposited with the will at Doctors' Commons. By means of communications with that gentleman, Mr. Thomas Williams, and Mr. and Mrs. Williams Reynell, or one or more of them, the solicitor would have acquired a sufficient * knowledge of the property, * 670 the timber cut, and the possession of the title-deeds by Mr. Henry Reynell's mortgagee. This too would not have taken much trouble or time, and the solicitor would then have told Sir Thomas Reynell that there was no doubt or perplexity or difficulty about the case, and that the freehold estates of Henry Reynell (incumbered, however, of course as he had incumbered them) must be considered as certainly and safely the absolute property of Sir Thomas Reynell, subject only to these qualifications: first, the life interest of Mrs. Williams Reynell, and the possible but necessarily hopeless claim on her husband's part of a life interest for himself; secondly, the very improbable possibility that Mrs. Williams Reynell might bear a child; thirdly, the circumstance that the husband or wife, or both, having cut timber irregularly, might do so again; fourthly, the improbable possibility that Sir Richard Reynell had left issue or a will disinheriting Sir Thomas Reynell; fifthly, the possibility that Sir Thomas Reynell might have issue, who would after his death be entitled.

Now, if the view and estimate of the facts and probabilities that I have stated are substantially correct, as I believe them to be, two questions seem to suggest themselves,—first, did Captain Sprye render any important or considerable service to Sir Thomas Reynell, beyond the mere fact of informing him that there was a will of Mr. Henry Reynell, under which Sir Thomas Reynell took valuable interests, whatever may have been the worth or merit of a service of that simple kind? a question which must, I think, be answered in the negative; secondly, what are we to think of the course of conduct pursued towards Sir Thomas Reynell by Captain Sprye and his solicitor, Mr. Yonge, during the interval between the time when Captain Sprye learned the existence

*671 of the * will and the time of Sir Thomas Reynell's execution of the impeached deed of conveyance in July, 1843? In considering this second question we should probably proceed at once to that instrument itself, which I have already read,—a deed which, if its nature, foundation, and intention are to be collected merely from its language and contents, is simply voluntary, purely gratuitous. It does not mention or indicate that Sir Thomas Reynell had employed Captain Sprye, or owed him money, or was or had at any time been liable to be sued by him at law or in equity; nor does it bind, or profess to bind him by covenant or otherwise to take any proceedings on the account or for the benefit of Sir Thomas Reynell, or to render Sir Thomas Reynell any services whatever. I may also observe, that the connection by marriage which it mentions,—a connection not proved or not otherwise proved, must have been slight or distant, if there was any at all; for though the connection is stated on the part of Captain and Mrs. Sprye to have been constituted by consanguinity between that lady and Sir Thomas Reynell, there is no suggestion nor any probability that either of them was descended from any great-grandfather or great-grandmother of the other. Indeed, in a letter to Mr. Williams Reynell of the 15th of April, 1843, Captain Sprye speaks of his own son's "descent from the old Devonshire branch of the family of Reynell" "by matches of two or three centuries back, but nothing connected with the branch from which Mrs. Williams Reynell descends and represents." It seems, moreover, that previously to the year 1835, there had been no acquaintance whatever between Sir Thomas and Lady Elizabeth Reynell or either of them on the one hand, and Captain and Mrs. Sprye or either of them on the other, and that if there was any intimacy it began in or after April, 1843: still, if the deed was not founded on an improper consideration, was not *turpi ex causâ*, was intended * by Sir Thomas Reynell to be in substance what it appears on the face of it to be, and was fairly obtained from him, it would be impossible to give relief against it. But how do those two or three circumstances stand? They stand as I now proceed to mention—first saying, however, though perhaps superfluously with reference to the expressions "improper consideration" and "*turpi ex causâ*," that notwithstanding the solemnity and force which the law ascribes to deeds, and all the strictness with which in general it prohibits the introduction of extrinsic evidence

to prove that an instrument goes beyond, or does not fully contain, or incorrectly exhibits the terms of the contract, which it was written and signed for the purpose of expressing or recording, the rule is settled (and not merely in Courts of Equity), that a deed *ex facie* just and righteous may be vitiated and avoided by alleging and adducing extrinsic evidence to prove that it was founded on a consideration, or had a view or purpose contravening law or public policy; nor would I mention the well known case of *Collins v. Blantern*, (a) but for the sake of referring, as I pass, to the very useful note appended to it in Mr. John William Smith's collection.

Besides the conveyance of July, 1843, there are in evidence two deeds, each of the same date with that. All were executed in July, 1843; two of these are produced, the other is proved by an admitted copy; one of the two produced is the conveyance just mentioned, which the decree declares void. The deed proved by the admitted copy is a power of attorney from Sir Thomas Reynell to Captain Sprye. The remaining deed produced is a deed of covenant to indemnify from Captain Sprye to Sir Thomas Reynell. Not, however, so was the first intention of Mr. Yonge and Captain Sprye, by whom, or by Mr. Yonge, as Captain Sprye's solicitor, which is the * same thing, it seems to have been * 678 meant originally, if I draw a correct inference from the papers which I have seen, that there should be only two instruments, embracing, however, the objects of the three actual deeds, but in a form differing, and a mode varying from them.

[His Lordship read the power of attorney and deed of indemnity. The former of these documents was a deed poll, dated the 15th of July, 1843. It contained the following recitals: "And whereas the said Sir Thomas Reynell is seised to him and his heirs in fee-simple in remainder or reversion under a will or alleged will of Henry Reynell deceased, late of Leatherhead, in the county of Surrey, Esq., deceased, of and in certain real estate situate in the several counties of Surrey, Devon, and Somerset, or elsewhere in Great Britain, or the said Sir Thomas Reynell is seised of an immediate estate of inheritance to him and his heirs in fee-simple of the same estates as heir-at-law of the said Henry

(a) 2 Wilson, 341, and Smith's Leading Cases, vol. i. p. 154; [5th Am. ed. [153] 489 *et seq.* and note.]

Reynell. And whereas the said Sir Thomas Reynell has determined upon appointing Captain Sprye to be the attorney of him, the said Sir Thomas Reynell, for the purposes hereinafter mentioned." The deed witnessed, that in pursuance of the said determination, and in consideration of the premises, Sir Thomas Reynell did thereby nominate and appoint the said Richard Samuel Mare Sprye the true and lawful attorney irrevocably of him, the said Sir Thomas Reynell, in the name of him, the said Sir Thomas Reynell, or in the names of the said Sir Thomas Reynell and Richard Samuel Mare Sprye, or otherwise as the said Richard Samuel Mare Sprye should think proper to commence, carry on, and prosecute any action or actions, suit or suits, or other proceedings either at law or in equity, as the said Richard Samuel Mare Sprye should deem requisite and necessary for the purpose of trying the validity of any will or alleged will of Henry Reynell deceased,

* 674 or * obtaining the legal and peaceable possession of all and every or any of the real estates late of the said Henry Reynell deceased, of or to which the said Sir Thomas Reynell was, could, or might be entitled by devise, descent, or otherwise, by, from, through, or under the said Henry Reynell deceased, and to make, sign, seal, and execute all and every such legal acts, deeds, matters, and things as might be thought needful or necessary for recovering all or any of the said estates late of the said Henry Reynell deceased, or any part or parcel thereof, or for the acquitting or discharging the person or persons from whom the same might be received or recovered. The other document was an indenture dated the same 15th day of July, between Captain Sprye of the one part, and Sir Thomas Reynell of the other part. It contained no recital, but witnessed that Captain Sprye thereby for himself, his heirs, executors, and administrators, covenanted and declared with Sir Thomas Reynell, his heirs, executors, and administrators, that Captain Sprye, his heirs, executors, or administrators would from time to time, and at all times thereafter, save, defend, keep harmless and indemnified, Sir Thomas Reynell, his heirs, executors, and administrators, and his and their lands and tenements, goods and chattels, of, from, and against all costs, charges, damages, and expenses whatsoever, which could, should, or might be sustained or incurred, or which might become payable for or by reason or in consequence of any action or suit, actions or suits, which might be brought or prosecuted in the name of Sir

Thomas Reynell, under or by virtue of the power of attorney, or in pursuance thereof, so as the same did not arise or accrue through the act of Sir Thomas Reynell, his heirs, or assigns.]

Now these three instruments, viewed together, do form certainly, even in their actual state of polish, no commonplace assemblage; but if we break the group * into individuals or into * 675 an unit and a pair, the result will not be less odd. Who saw ever before such a document as the impeached conveyance? And would it remove the surprise of any learned or unlearned person, having read that deed without any knowledge of the extrinsic facts, and immediately afterwards being informed of the existence of the two other instruments, to read them and find them what they are? In saying this I do not exclusively allude to the word "irrevocably," contained in the power of attorney.

Again, I apprehend that the power of attorney and deed of indemnity read in ignorance of the impeached deed and of the extrinsic facts, would create a strong suspicion of illegal or improper dealing. The appointment of an attorney irrevocably by an instrument having apparently no other purpose, and the taking of an indemnity from that attorney against the costs of the suits which, as the attorney, he shall institute—the indemnity being by a simultaneous instrument, having no other object—may well be thought out of the ordinary course of fair transactions. It is mere repetition to observe, however, that the three documents together do not contain or express, do not profess to create, any agreement or obligation upon Captain Sprye's part to institute or prosecute any suit, take any proceedings, make or pursue any investigation, or perform any operation whatever.

Do then the three instruments, taken together, express the true intention and the whole agreement of the parties to them, or at least of Sir Thomas Reynell and Captain Sprye, so that it could be fair or right, independently of any question of misdemeanour or public policy, to act on the impeached deed of conveyance simply according to its purport, or as affected only by the purport of the two other instruments?

* This question cannot be well answered without reading * 676 a correspondence by no means laconic, in connection with which some other documents may be considered worthy of attention, and among them certainly the exhibit R., of which I will in the first place say a few words.

[After analyzing and commenting upon the exhibit R., which was the draft of the conveyance of 1843, as it originally stood, and other papers showing the modifications which it underwent, and referring to the parts of the correspondence tending to show the real nature of the agreement, his Lordship said:] The understanding, the agreement, that I have been just mentioning, appear to me to have been in substance and effect this: that inasmuch as Mr. Henry Reynell was believed by Sir Thomas Reynell and Captain Sprye to have died the owner of freehold estates considerable in extent and value, as Sir Thomas Reynell was neither in the possession or enjoyment of that property or any part of it, nor correctly aware of its particular situation or rental, but as they believed that in the character of heir, if he was the heir, of Mr. Henry Reynell, or in the character of heir, if he was the heir, of Sir Richard Reynell, or in the character of devisee under the will, if there was a will, of Mr. Henry Reynell, valid as to his freehold estates, or in more than one or each of these modes, Sir Thomas Reynell had some right or rights, immediate or not immediate, of more or less value or importance, to or in those estates, and as this right or supposed right, these rights or supposed rights, Captain Sprye represented to Sir Thomas Reynell, and he accordingly considered to be, of uncertain extent, likely to be resisted or questioned, nor susceptible immediately or easily of proof, the ascertainment, assertion, and establishment of this right, or these rights, if any, whether on the footing of intestacy on the part of Mr. Henry Reynell or otherwise, were to be, and were, un-

* 677 dertaken * by Captain Sprye, so far at least as reasonable diligence and reasonable endeavours on his part would extend and could be effectual — that the expenditure for the purpose should be his — that Sir Thomas Reynell should be at no expense nor incur any liability — and that on these terms Captain Sprye should have half the benefit of what should be so ascertained, asserted, and established; that is to say, should — subject to the life-estate, if there should prove to be any, of Mrs. Williams Reynell, to the life interest, if there should prove to be any, of her husband, to the interest, if any, of her possible issue, to the interests, if any, of Sir Thomas Reynell's possible issue, to the interests, if any, of Sir Richard Reynell's issue, if any, and of his devisee, if any, and to the questions, whether material or immaterial, of Sir Richard Reynell having been Mr. Henry Reynell's heir,

and Sir Thomas Reynell being Sir Richard Reynell's heir — have half the freehold property of Mr. Henry Reynell, whatever it might be.

Such an understanding, such an agreement, which were in my opinion expressed substantially with sufficient accuracy upon the exhibit R. in its original state, nor ever abandoned by Captain Sprye or Sir Thomas Reynell, however affected by the agreement of May, 1844, may or may not have amounted strictly in point of law to champerty or maintenance so as to constitute a punishable offence, but must in my judgment be considered clearly against the policy of the law, clearly mischievous, clearly such as a Court of Equity ought to discourage and relieve against. I need not repeat a reference to the authorities quoted during the argument, nor need I mention *Wallis v. The Duke of Portland*, (a) *Henny v. Browne*, (b) *Burke v. Greene*, (c) * and *Stevens v. Bag-* * 678 *well*, (d) if they were not particularly cited.

It was suggested, by one at least of the learned counsel, that cases between solicitors and clients, and cases where the illegality of a contract, or its contravention of public policy, has been effectually alleged by a defendant against a plaintiff, furnish little or no support to a bill such as that of Sir Thomas Reynell; and it may be true that principles or rules are applicable to transactions between solicitors and their clients, which are not applicable to those between persons standing not in any such or any similar relation to each other;¹ but it was not, nor could reasonably have been, said, that a transaction may not be bad for champerty or maintenance, or (to use a phrase more than once found in the books) as savouring of champerty, though between persons not affected by any such or any analogous connection. Again, we know that there are instances

(a) 3 Ves. 494.

(c) 2 Ball & B. 517.

(b) 8 Ridg. P. C. 462.

(d) 15 Ves. 139.

¹ See *Sprye v. Porter*, 7 El. & Bl. 58, 83, note to Am. ed.; *Rust v. Larue*, 4 Litt. 411. An agreement between attorney and client, by which the latter was to advance the necessary expenses of the suit, and in the event of failure the former to have nothing for his services, but in case of success to be entitled to a fraction of the property recovered, or its money value, was held void for champerty, in *Backus v. Byron*, 4 Mich. 535; S. C., 10 L. R. N. S. (1858) 13. See also *Merritt v. Lambert*, 10 Paige, 352; *Lathrop v. Amherst Bank*, 9 Met. 489; *Brown v. Beauchamp*, 5 Monroe, 413; *Elliott v. McClelland*, 17 Ala. 206; *Holloway v. Lowe*, 7 Porter, 488; *Weakly v. Hall*, 13 Ohio, 167; *Potts v. Francis*, 8 Ired. Eq. 300.

in which a case, available and effectual in this Court for defeating a plaintiff, is unavailable and ineffectual for the purpose of obtaining a decree against a defendant. Upon many a contract, whether bad or good at law, this jurisdiction has refused to act whether for or against the instrument or transaction, and in the present instance of course the dismissal of the bills of Sir Thomas and Lady Elizabeth Reynell, would not necessarily be inconsistent with the dismissal of the bills of Captain and Mrs. Sprye. It is obviously true, that Sir Thomas Reynell participated in the transaction which I have just described and characterized, and if he and Captain Sprye had been, to use the old legal phrase, in *pari delicto*, and public policy ought not to be considered as interested in favour of allowing one to sue the other for relief against the contract, there might possibly be ground for contending that Sir Thomas Reynell's

* 679 *suit ought to fail. But where the parties to a contract against public policy, or illegal, are not in *pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him, as we know from various authorities, of which *Osborne v. Williams (a)* is one.

Here it cannot reasonably be said that Captain Sprye, in the matter of the impeached deed of July, 1843, was not more blamable than Sir Thomas Reynell, who either had not a legal adviser as to the matter or had none but Mr. Yonge, and if Mr. Yonge was so, he adhered much more to Captain Sprye than to Sir Thomas Reynell, and failed in duty to the latter, who I am, upon the evidence, convinced did not suppose that in entering into the agreement on the basis of which the impeached deed was executed by him, or in executing it, he was doing an act contrary to public policy, or illegal, or open to the censure of a Court of justice. I believe that he did not mean to do any thing wrong.

But what are we to say or think of Mr. Yonge and Captain Sprye, who had Mr. Yonge for his adviser? Did either of them suppose the agreement unobjectionable? If so, why was the conveyance framed as it was? Why did it not express and embody what was the true bargain, the true arrangement? Why, as I said before, were there three instruments? Whatever the case

(a) 18 Ves. 379.

between Sir Thomas Reynell and society at large, he was, as between himself and Captain Sprye, entitled to believe the incorrect and unwarrantable statements contained in the letter of the 29th of April, 1843, in these words: "A system has grown up among men of business * of conducting such cases on the * 680 arrangement that no law expenses are paid unless success attend the proceedings, in which case they are first paid out of the money recovered, and the party conducting the proceedings and furnishing the information, is allowed for his compensation half of what is recovered, which is also to satisfy him for the risk of paying law expenses, without perhaps succeeding." And again, when speaking of "a legal man" unnamed, the writer uses these expressions: "He said, that if he found what I stated to him to be borne out by documents, he would undertake the case legally on the usual arrangement as above." I call these statements incorrect and unwarrantable on the supposition, which I think reasonable, that Captain Sprye in using the words "men of business" and "legal man," meant Sir Thomas Reynell to understand him as referring to decent people, to persons of possible respectability, and not to breedbates, barrators, or counsel whom no inn will own, and solicitors estranged from every roll. What too can be said for Mr. Yonge's letter of the 12th of May, 1843, in which, without any expression of surprise, dissent, or disapproval, he, an admitted and enrolled attorney, writes of the "informant" or supposed informant of Captain Sprye, considering himself "entitled to half the property when recovered, after payment of all expenses, which, however, he was to defray if unsuccessful," and afterwards uses (not as it seems ironically, or at the least not with apparent irony) the word "generously," the same letter recommending "some legal document stipulating to the above effect"? Some legal document! Whatever may have been the forgetfulness or influence under which Mr. Yonge consented or submitted to write that letter, is Captain Sprye at liberty to allege, for any effectual purpose in this litigation, that Sir Thomas Reynell was not entitled to believe it the spontaneous letter of a professional man, able and willing to advise according to his position * and station? * 681 A letter less objectionable might have been made worse by the fact that its language was dictated or suggested to the writer by the person to whom it was written; but this letter seems beyond any such heightening.

Perhaps it might with some plausibility be suggested, as an argument against the illegality of the deeds of 1843, or their contravention of public policy, that Sir Thomas Reynell's rights were so certain, plain, and clear as to exclude any notion of rational controversy. It must, however, be recollected that the validity of Mr. Henry Reynell's will, as a will of freehold estates, had been represented to Sir Thomas Reynell, and must be taken to have been considered by him, as questionable — that the same may be said of the possible result of the claim to a reversionary life interest for Mr. Williams Reynell — that difficulties had been suggested as to the heirship and intestacy of Sir Richard Reynell, and the heirship to Sir Richard Reynell, which cannot be thought to have had no influence on Sir Thomas Reynell's mind — and that his notions of the construction and effect of the will were vague and obscure. To his apprehension, therefore, and according to his understanding when he executed the deeds of 1843, and when he signed the draft of 1844, his rights were not certain, plain, or clear. Believing them to be otherwise, he acted on that idea, and, ignorant of the law, entered into a bargain with views and for purposes prohibited by law. It was his intention to break, not knowing, the law. No man can say that Sir Thomas Reynell would have executed any one of the deeds knowing at the time the nature and extent of his rights, and that they were plain and clear, nor capable of being rationally opposed.

The possible argument to which I have been just referring, * 682 ring, * exhibits also this dilemma; if from the certainty, clearness, and plainness of Sir Thomas Reynell's rights there was no breach of law or of public policy in the transaction of 1843, and the facts and circumstances of that transaction have been correctly viewed by me, what answer is there to the case alleged of mere fraud? I repeat distinctly, that in my judgment Sir Thomas Reynell did not know or did not understand accurately or sufficiently the material facts, the extent of his rights, their nature, and the rules of law applicable to the will, when he executed the deeds in question, or when he signed in 1844 the draft of the proposed conveyance under the agreement of May (a draft recognizing and purporting to confirm the conveyance of July), each of which acts he did either without any legal assistance, or with worse than none.

Any thing to my apprehension more thoroughly bad in equity

upon the whole than the deed impeached I never knew ; nor after close attention to the subject, can I hesitate as to relieving against it in Sir Thomas Reynell's suit. If, indeed, after its execution, he had, with sufficient knowledge of the true state of the facts and of his rights, either confirmed the deed or allowed Captain Sprye to bestow labour and incur expense upon the basis of it, and in reliance on it, a different course might very possibly have been correct, but no such case is proved, or in my opinion provable. There was no substantial difference, it is plain, in my judgment, between the state of his mind and information when he executed the deeds of 1843 and when he signed the draft of the conveyance.

With respect to the agreement of May, 1844, it is so closely connected, so intimately associated, with the impeached deed, that the deed failing, I do not see how the agreement can with propriety be supported. Can it be *alleged that without * 683 the deed, without the transaction upon the basis of which Sir Thomas Reynell was induced and intended to execute the deed, can it be safely said that free, and knowing himself to be free, from that transaction and the deed, he would have made the agreement? Would not to hold the latter binding on him be in a sense to give a degree of force and effect to the deed? retaining the agreement, would not Captain Sprye be retaining a benefit substantially under the deed? I am of opinion, that Sir Thomas Reynell having entered into the agreement under the erroneous notion that he was bound by the deed, from which in my judgment his devisee is entitled to be delivered and relieved, that lady is entitled to be delivered and relieved from the agreement also. And this I say independently of the very questionable means (they were probably more, indeed, than questionable) to which subsequently to October, 1843, Mr. Yonge and Captain Sprye, or one of them, had recourse, for the purpose, I will not say of driving, I will not say of coaxing, I will say of conducting Sir Thomas Reynell into the agreement, in which matter as to legal or professional advice he stood as he did in the matter of the deeds.

Stress was also during the argument professed to be laid on a case (a) decided by the House of Lords in the year 1848, reported by Messrs. Clark and Finelly, which, however, can be better and more thoroughly understood by reading the printed appeal papers

(a) *Wilde v. Gibson*, 1 H. L. Cas. 605.

belonging to it, but especially the examination of it, in a treatise of the law of property as administered by the House of Lords, published in 1849, (a) a well-known and valuable work, * 684 where the learned author has elaborately considered * the case, on which if his comments are well founded, it is perhaps as remarkable as any in the history of civil judicature of the House of Lords. But whether his views of the facts, the equity and the law of it, or on the contrary those taken by the peers, who advised the House of Lords upon it, are correct, it is binding here as an authority, and, if it can, ought to be applied in this instance. I do not find myself able, however, so to apply it, or to agree with the learned counsel for Captain and Mrs. Sprye, in their assimilation of it to the present. I do not consider the former as furnishing a rule or precedent for the latter. It has been contended, that fraud or impropriety of conduct has not been alleged by Sir Thomas Reynell's bill, except against Captain Sprye and Mr. Yonge jointly, and that, as Mr. Yonge has been dismissed, though without costs, and there has not been a petition of rehearing, or appeal by him or Lady Elizabeth Reynell, the consequence must be the dismissal of Sir Thomas Reynell's bill. To this, however, I cannot accede. Upon the circumstance that the actual petition of rehearing or appeal is general and unlimited, and that Mr. Yonge, a respondent to it, has appeared upon it, I lay no stress. I give no opinion whether *rebus sic stantibus* the Court has jurisdiction to vary the Vice-Chancellor's decree in a manner favourable to Mr. Yonge, or unfavourable to him. But it was, I apprehend, clearly within the judicial power of the Vice-Chancellor, dismissing Mr. Yonge, to make with consistency the decree which I find made against Captain and Mrs. Sprye. The argument has in effect gone the length of contending that where relief in equity is sought against a man alleged to have obtained an instrument by fraud, or otherwise improperly, from the plaintiff for the benefit of that defendant, and the facts alleged as constituting or showing the fraud or impropriety are proved against him, and do constitute or show * 685 the fraud or * impropriety, the suit must fail, if the bill has incorrectly and untruly alleged a third person to have been a participator and joint actor in the facts, with such intentions and in such a manner as to have been guilty of the fraud or miscon-

(a) Sugd. Law of Property, p. 614.

duct equally and in co-operation with him. That incorrect and untrue mode of stating the case may affect the costs, but to say that it can do more is to contradict alike theory and practice, precedent and principle. Where indeed it can reasonably be suggested that the defendant may have been to his prejudice crippled or misled in his defence by the plaintiff's inaccurate mode of stating his case, the Court has the means of providing a remedy for any possible injustice, not only, as I have said, in point of costs, but by giving the defendant an opportunity of adducing evidence, or further evidence, before itself, or a master, or a jury. Here in my judgment, neither Captain nor Mrs. Sprye has been crippled or misled in the defence.

And let me observe, that whatever ought to be thought of Mr. Yonge's conduct, as fraudulent or free from fraud, it is clear that in a course of acting contrary to public policy, and to rules by which a professional man especially ought to hold himself bound, Mr. Yonge has, through misapprehension or insufficient information, or otherwise, without or with censurable intentions, directly participated, and as he was personally mingled with the case in 1843 and 1844, so he appears in it in a questionable light often enough to relieve from blame and to prevent much wondering at the act of making him a defendant. Nor am I sure that if Mr. Yonge had been made by the Vice-Chancellor liable for the plaintiff's costs in Sir Thomas Reynell's suit, I should have been prepared to dissent from that. Here there was a masked transaction. A solicitor ought to know that his duty professionally prohibits him (if as a man he is not by instinct *drawn back) * 686 from assisting or lending his name or credit where there is *aliud simulatum, aliud actum*. Here there was *aliud simulatum, aliud actum*. Mr. Yonge was an abettor in composing and uttering documents which, not recording an affair of business as it truly was, did record it as truly it was not. And why? Because the true transaction was unlawful—because, truly told, it announced its own failure, vanity, and nothingness (to use no harsher term), and this is done by a minister, an officer of the superior Courts of justice. If Captain Sprye (whether student or not) was unaware how the English laws regard the traffic of merchandising in quarrels, of huckstering in litigious discord, or was ignorant of the value of truth merely as a commodity in business, Mr. Yonge should have informed him better; nor in any event

should Mr. Yonge have allowed Sir Thomas Reynell to remain at once without a solicitor and without a due understanding of the manner, the grave manner, in which he, a gentleman and a soldier full of years and honour, was committing himself. Still I cannot say that I have a firm impression that the decree ought to have charged Mr. Yonge with the costs, and he will be neither charged nor relieved on this occasion. It has not indeed been suggested for him, that he ought to have his costs.

It has been said likewise, that Sir Thomas Reynell's bill, so far as it is directed against Captain Sprye on the ground of fraud distinct from champerty, or supposed champerty, and distinct from any question of public policy, is, if not groundless, at least exaggerated and inflamed in a manner to be disapproved and discouraged.

For this argument, whatever its weight or extent, there was probably more foundation in a former than in the present state of the bill, and perhaps even in its actual state there is some

* 687 room. The mode of acting, * however, which Captain

Sprye seems to have thought justifiable, was such, on his part, that he cannot, I think, well complain that it was viewed unfavourably, even without regard to any question of mere law or public policy. Still, if so far as Sir Thomas Reynell's suit is concerned, the decree had exempted Captain Sprye from a portion at least of the costs, it may be that I should have agreed. Sir Thomas Reynell was not a young, an embarrassed, or an isolated man; he was not out of society; was well connected; was the brother-in-law of an archbishop; was often or occasionally in London; was in good circumstances; of high military rank, and had the means of obtaining with facility the best advice. If he was deceived, he was so under circumstances that do not, it is true, induce me to say *qui vult decipi decipiatur*, but may remind one perhaps of the saying. And if he was merely in error he recalls that passage in the Digest (Lib. xxii. tit. 6, ix.), where Paulus tells us—“*Sed facti ignorantia ita demum cuique non nocet si non ei summa negligentia obijciatur. Quid enim si omnes in civitate sciant, quod ille solus ignorat. Et recte Labeo definit scientiam neque, curiosissimi, neque negligentissimi, hominis accipendam, verum ejus qui eam rem diligenter inquirendo notam habere possit. Sed juris ignorantiam non prodesse, Labeo ita accipiendum existimat, si juris consulti copiam haberet vel sua*

prudencia instructus sit — ut cui facile sit scire, ei detrimento sit juris ignorantia. Quod raro accipiendum est."

Sir Thomas Reynell, too, though not as I have said in equal fault with Captain Sprye, was a party to a bargain against public policy. Yet if these considerations are insufficient, as of course they are, to justify disingenuousness, how very far are they from affording an excuse for * turning to advantage the * 688 unsuspecting trust of confiding simplicity !

Whatever may formerly have been the course or supposed course of this jurisdiction, it is now, I apprehend, considered, that where the Master of the Rolls or a Vice-Chancellor has by decree given substantial relief against a defendant, with costs against him personally, it is competent to this jurisdiction, upon a rehearing by way of appeal, affirming the decree as to the relief, to vary it as to the costs ; but I conceive that to render this course correct, there ought to be a judicial dissent as to the costs, strong, clear, and undoubting. That the decree here, so far as it goes, is certainly right in the relief which it gives, I have no doubt ; and as to the costs of Sir Thomas Reynell's suit, if I doubt, I cannot say that I do more ; or that the inclination of my opinion is not with the decree in this respect.

It is of necessity included in what I have said, that in my opinion the bills of Captain and Mrs. Sprye must stand dismissed, but I will add that this I should have thought right, even had it appeared to me correct to dismiss the other bills ; for upon all the principles which have guided the Court of Chancery during a long series of years and now regulate it, the indisputable facts of the case show an absence of all title on the part of Captain and Mrs. Sprye to ask what their bills ask from a Court of Equity. This is plain and clear, nor perhaps would it be wrong to say, too plain and clear for argument. To suppose a Court of Equity capable of interfering for the purpose of giving specific effect to either of two such instruments as the conveyance of July, 1843, and the agreement of 1844, obtained as they were, is surely to suppose it capable of forgetting or abandoning every rule of * rational * 689 jurisprudence. The claim, indeed, of Captain Sprye as a plaintiff, which ought to be carefully all along distinguished from his resistance in his character of a defendant, brings to mind the commencement of one of Lord HARDWICKE's judgments, in which he said, " Next to the surprise and concern one has to see persons

enter into such a combination as this, is the surprise to see it contended in a Court of justice. It is most extraordinary to think that a Court of justice can wink so hard as to suffer it to be supported." That case is particularly mentioned by Lord ELDON in another, where the most striking perhaps of Sir Samuel Romilly's replies was made — *Huguenin v. Baseley* (a) — the judgment delivered in which contains more than one remark not without bearing here. There, too, the person alleging that she had been unfairly dealt with, or unduly influenced, was plaintiff.

It is impossible, I think, to doubt that the Vice-Chancellor disposed justly and correctly of the costs of the suit of Captain and Mrs. Sprye, and I consider that the costs of the appeal ought to be borne in the same way.

There are two or three matters, not probably of much importance, which the decree has not, but which very possibly the Vice-Chancellor, if asked, would have provided for; first, I think that Lady Elizabeth Reynell should undertake to abide by such order or orders as the Court shall now or hereafter make concerning the deed of indemnity, and that the deed of indemnity and any draft or drafts in existence which Sir Thomas Reynell has signed of the three instruments or any one or more of them, or of the intended conveyance under the agreement of 1844, should be deposited in the Master's office, subject to further order.

* 690 * Next I consider that, if Lady Elizabeth Reynell shall desire it, there should be an injunction restraining Captain Sprye from bringing or prosecuting any action, or proceeding at law against Lady Elizabeth Reynell as the executrix or devisee of Sir Thomas Reynell, upon or in respect of the two instruments which the decree declares void, or either of them, or any draft or drafts signed by him of the deed which the decree declares void, and of the intended conveyance under the agreement of 1844, or either of them.

THE LORD JUSTICE LORD CRANWORTH. — Sir Thomas Reynell, the original plaintiff, rested his right, and Lady Elizabeth Reynell, as representing him, now rests her right, to the relief sought to be enforced in this suit on two grounds. First that the instruments impeached are void on the ground of fraud; and secondly, that

they are so as founded on champerty. Sir JAMES WIGRAM decided in favour of the plaintiff on the first ground; and after a full consideration of the facts, I am of opinion that they do disclose a case of fraud, entitling the plaintiff on that ground to what he seeks by his bill; so that the decree is in all essential points correct.

My learned brother has gone so fully into the case, that agreeing with him, as I do, in the result at which he has arrived, it might perhaps have been enough for me simply to express my concurrence, and so leave the matter where it now stands. But considering the nature of the dispute, we thought it more fair to the parties to reduce to writing each of us his view of the case, so that it might not only appear that we concurred in the same result, but also that the reasoning which each of us had separately deemed sufficient to warrant the conclusion at which we had arrived, might be explained.

* I have said that the facts established in proof disclose * 691 a case of fraud fully warranting the decree. It may be impossible to give a definition of what constitutes fraud in the contemplation of a Court of Equity, so as to meet all the various combinations of circumstances to which that word may apply; but there can be no difficulty in saying, that whenever any one has, by wilful misrepresentation, induced another to part with his rights on the belief that such representations were true, this is in the plainest and most obvious sense a fraud which this Court will not tolerate.

Now I am of opinion that beyond all doubt Sir T. Reynell was induced to execute the conveyance of the 15th of July, 1843, which it is the principal object of this suit to set aside, by repeated misrepresentations made to him by Captain Sprye, and so that this Court cannot permit that conveyance to stand.

The conveyance was executed in pursuance or in consequence of an agreement contained in a letter of Sir Thomas Reynell, dated 1st of June, 1843. The material part of that letter is as follows: "Avisford, Arundel, 1st of June, 1843. My dear Sir, — I am very much obliged to you for the trouble you have taken in explaining to me further particulars of the business in hand, and after reading over carefully your letter of yesterday, I feel satisfied that the first proposed arrangement, whereby I meant to engage to give up the half of the property recovered, subject to no law expenses, either on success or failure in the suit, is the best for me to pursue, and

I therefore agree to it, hoping that the result may hereafter prove to our mutual advantage."

By this letter, then, Sir T. Reynell agrees to give up half * 692 the property to which he might be eventually found * entitled, in consideration of his being indemnified against all costs whatever incurred in the attempt to recover it, whether that attempt should or should not prove successful.

The first inquiry to be made is, How came he to enter into such an agreement? Fortunately for the interest of truth, the elucidation of this case depends very little on oral testimony, on the recollection of witnesses liable to error. It is derived almost entirely either from admissions of the parties, or from their letters.

It is hardly necessary to advert to any thing which passed between them previous to the month of April, 1843. Captain Sprye says, that shortly before that month he had been informed by a Mr. Llewellyn, that the plaintiff was entitled to large real estates, formerly the property of Mr. Henry Reynell, a distant kinsman of the plaintiff, who had died in December, 1824; and that in consequence of that information, he, on the 21st of April, directed his clerk or assistant, Mitchell, to search at the Prerogative Office for the will of Mr. Henry Reynell. Mitchell accordingly did so; and on that same day found and read the will and communicated the contents, so far as his memory enabled him, to Captain Sprye. On the following day, namely, the 22d of April, Captain Sprye, who seems to have then been engaged in composing for publication a genealogical work, wrote to Sir T. Reynell making some inquiries as to his pedigree, and in that letter he alludes to the fact of his having made some discovery, which, though it could not, so far as he could discover, enable him to benefit Sir T. Reynell himself, yet might enable him to benefit his heir. Sir T. Reynell appears to have answered this letter on the 26th of April, but from some cause, which is not material to inquire about, the

* 693 answer did not reach Captain Sprye till * the 3d of May, previous to which date he had again addressed Sir T. Reynell by a letter dated the 29th of April. This letter we may well treat, so far as this suit is concerned, as the opening of a negotiation which led to the agreement contained in the letter of the 1st of June, and so eventually to the execution by Sir T. Reynell of the impeached deed of conveyance. This letter of the 29th of April, so far as it is material now to consider it, is as follows :

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after informing Sir T. Reynell that he was about to prosecute his genealogical studies for the purpose of practising at the bar of the House of Lords in peerage cases, he proceeds thus: "The Reynell family I take particular interest in collecting a complete history of, for print, and it has been in making researches for it through my record searches, in the several depositories of public records, that I discovered what I conceive to be the means of benefiting your heir-at-law. Since I wrote you, I have employed my clerks in still further investigating the matter, and to see if it was not possible to do the benefit to you instead of the other party. It is, as all these things are, doubtful, and can only be tested by legal proceedings, the result of which may give nothing, and may gain something considerable. Now almost all men are frightened at the idea of law proceedings to recover property, and consequently a system has grown up among men of business of conducting such cases on the arrangement that no law expenses are paid, unless success attend the proceedings, in which case they are first paid out of the money recovered, and the party conducting the proceedings and furnishing the information is allowed for his compensation half of what is recovered, which is also to satisfy him for the risk of paying the law expenses without perhaps succeeding. I have mentioned briefly to a legal man the case, and mode in which I consider I have discovered a way to benefit your heir-at-law; he has not * yet given me a decided * 694 opinion, but from what he observed, I consider my belief strengthened. He said, that if he found what I stated to him to be borne out by documents, he would undertake the case legally on the usual arrangement as above. There is but a faint chance that the discovery can be made to benefit you, and as whether for you or your heir-at-law's benefit, it will be necessary to institute legal proceedings, will you say if you will be content that it shall be done under my direction and control on the foregoing plan; that if you are benefited nothing, you pay nothing, and the lawyers lose their expenses and labour; and if you are benefited, you allow half of what may be gained to you, to them, for their risk and remuneration? I shall be glad to hear from you at your leisure on this point."

Looking then to this letter as the basis of the subsequent treaty, the question is, whether it contains any untrue statements calculated to mislead Sir T. Reynell, for if it does, and if they were

known to Captain Sprye to be inconsistent with truth, and were in any degree calculated to influence the mind of Sir T. Reynell, they will render invalid all the subsequent negotiations based on them.

Now after fully considering this part of the case, I feel bound to conclude that in this letter Captain Sprye was misleading Sir T. Reynell on more than one point; he was misleading him on the subject of what he represents to be the usual course among men of business in conducting litigation; that is, that the parties for whose benefit it is conducted, should be indemnified from costs, and then should give up half the property recovered as a compensation or reward to the party carrying on the proceedings.

Captain Sprye distinctly states that this is the usual practice, and so states it as evidently to imply * 695 that it is both a lawful and an honourable practice. But though this is contrary to the fact, yet it may be said, perhaps Captain Sprye might have supposed he was only stating the truth. Let us see how that is; Captain Sprye not only states the practice to be usual and impliedly honourable, but he says that he had mentioned it to a legal man who had said he would, if Captain Sprye's representations on the subject of Sir T. Reynell's rights were borne out by the documents, undertake the case legally "on the usual arrangement as above." I quote the very words.

This amounts impliedly to a representation, first, that the person designated "the legal man," had represented the arrangement as usual; and, secondly, that he had undertaken to act on it. Who then was that legal man? Mr. Yonge was then Captain Sprye's solicitor; and Captain Sprye in his first answer says that if Mr. Yonge was not the person referred to as the legal man, he does not know who it was. It is true that in the second answer, he says he thinks the person intended as the legal man was his clerk, Mr. Mitchell, but that cannot be, for in the first place the legal man, according to the letter, had said that he would on certain contingencies undertake the case legally, that is, professionally, and this shows that the legal man must have been an attorney or solicitor, whereas Mr. Mitchell was a mere clerk or assistant to Captain Sprye, aiding him in his genealogical inquiries—who could not, if he would, have conducted the case professionally—and, secondly, the legal man is represented as having said that if he found what Captain Sprye had stated to him was borne out by

documents, he would undertake the case. This is altogether inapplicable to Mitchell. There were no documents except the will, and that had been communicated by Mitchell himself to Captain Sprye, and of course therefore was not a matter to * be * 696 communicated by Captain Sprye to Mitchell. Clearly, therefore, this allusion in the letter to a legal man, must have been altogether unfounded, or else it must have meant to represent that Mr. Yonge had agreed to undertake professionally the conduct of the law proceedings necessary for enabling Sir T. Reynell, or his heir, as the case might be, to obtain the property on the terms that he represented as the usual terms; namely, that Sir T. Reynell was to incur no costs, and that Mr. Yonge should, if the suit should be successful, receive one half of the property recovered by way of payment for his services; but that if nothing should be recovered, then he should himself bear all the costs. With such a representation, Sir T. Reynell, supposing him to place reliance on its accuracy, might well think that the most prudent plan for him to pursue would be to follow the course thus considered both by Captain Sprye and Yonge to be the most fair and usual in similar cases; that is, to enter into the agreement contained in his letter of the 1st of June.

Let us now consider whether on the evidence we can believe that Mr. Yonge had in fact made the statement to Captain Sprye which the letter says he made; that is, did represent the proposed terms as being the usual mode of conducting litigation, and did offer himself to undertake the business on those terms.

[After reading and commenting on the documentary evidence bearing on that part of the case, his Lordship continued:—]

We have thus a negotiation opened between Captain Sprye and Sir T. Reynell, founded on what I consider to have been misrepresentation, necessarily leading Sir T. Reynell to believe that the basis on which Captain Sprye * proposed to conduct the * 697 litigation for the benefit of Sir T. Reynell, was fair and usual, and that in the ordinary intercourse between Captain Sprye and his solicitor, the latter had so treated and was ready to act on it.

Putting, then, this construction on what had passed between the parties, I am of opinion that the original negotiation was

founded on what must be treated in this Court as a fraudulent misrepresentation ; and that for however long a time the negotiation afterwards continued, and into whatever ramifications it afterwards extended, the original vice continued to taint it, and that Captain Sprye can never claim the benefit of any deed or instrument founded on it.

In these remarks I have proceeded on the assumption, that the impeached deed was, in fact, founded on the previous letters to which I have adverted. It is, I think, impossible to come to any other conclusion. I am aware that the terms of the conveyance, as it was eventually executed, differ in several material particulars from those originally contemplated, but the circumstances of the case satisfy me that Sir T. Reynell, though probably not unaware, to some extent, of the change made in the form of the deeds, yet executed them in the full belief that he was substantially carrying into effect the proposal originally made to him. I do not pursue this part of the case, which my learned brother has so fully investigated.

This, then, being my opinion ; being, as I am, satisfied, that Sir T. Reynell was induced to execute the impeached deed on the representation that the proposal to divide the produce of the litigation was one emanating from Yonge, and on which he had been ready and had offered to act, it would perhaps be enough for
 * 698 me to leave the * case here ; for where a party has induced another to act on the faith of several representations made to him, any one of which he has made fraudulently, he cannot set up the transaction by showing that every other representation was truly and honestly made.¹ But I feel it my duty to follow this inquiry further, lest I may have taken too strong an impression from the single point to which I have yet adverted.

Let me suppose, then, that there was, on this head, no wilful misrepresentation ; that what Captain Sprye stated to be the usual practice and to be approved by Mr. Yonge, really was so, or at all events was believed to be so, by Captain Sprye, and that he continued in that belief up to the time when the conveyance was executed. Was there any other representation contained in the letter of the 29th of April, and in those which followed, inconsistent with truth and calculated to mislead Sir T. Reynell ?

¹ See Chitty Contr. (10th Am. ed.) 754 ; Addington v. Allen, 11 Wend. 375 ; Young v. Hall, 4 Geo. 95.

[After referring to the evidence bearing on this point his Lordship said : —]

The result of all this is, that Captain Sprye having received from Mr. Llewellyn the information in question, but not entirely trusting to its correctness, it occurred to him very naturally to send to the Prerogative Office in order to learn whether any will of Henry Reynell was there to be found, as it must be, if the story told by Mr. Llewellyn was true. He accordingly sent Mr. Mitchell, his clerk, to make the inquiry on the 21st of April. Mr. Mitchell found the will, read it, reported its contents, so far as his memory served him, to Captain Sprye. Captain Sprye does not anywhere say that Mitchell's report of its contents was not substantially accurate, and I must consider it clear that it was so, at least to the extent of apprising Captain Sprye * that * 699 the testator's daughter was referred to in the will, in terms which clearly showed her to be illegitimate, that she was made tenant for life with remainder to her children, and that if she died without issue, the property would go either to Sir T. Reynell himself or to some branch of his family. I do not believe that at this time, nor indeed until some weeks afterwards, it was understood by Captain Sprye that Sir T. Reynell had an absolute indefeasible interest in the property, subject only to the life interest of Mrs. Williams Reynell, and the chance of her having a child. I believe and shall assume, that at this time, and until the middle of the following month of June, Captain Sprye believed that unless Sir T. Reynell survived Mrs. Williams Reynell, he could never take any interest in the property, but that it would, on her death without issue, go to the person who should then fill the character of heir-at-law either of Sir T. Reynell himself, or of his late elder brother, Sir Richard Lyttleton Reynell — probably he did not distinctly understand which.

In addition to the knowledge thus acquired, Captain Sprye certainly knew, as appears from his letter to Mrs. Williams Reynell of the 15th of April, that Mrs. Williams Reynell had been married since 1821, and Miss Scully's letter to him of the 25th of April had informed him that she had no children — and he would therefore naturally treat the chance of her having issue as a matter not worth much attention. Captain Sprye had in two letters written before that of the 29th of April, namely, one on the 15th,

and the other on the 22d, the day after the will had been seen, hinted to Sir T. Reynell the possibility of his being able to benefit either him or his heir, but he had not entered into any particulars.

So matters stood when Captain Sprye wrote the letter * 700 * of the 29th of April, which, as I have already stated, I consider to be the basis of all that followed.

The impression which this letter was calculated to make on the mind of Sir T. Reynell, as to the mode by which Captain Sprye had obtained the knowledge of what was to benefit Sir Thomas Reynell or his heir-at-law, was certainly very far from correct. Sir Thomas Reynell would naturally understand from it, that Captain Sprye's clerks, or as he calls them his record searchers, had, in the progress of their genealogical researches, accidentally discovered something which would benefit Sir T. Reynell or his heir; the truth being that the record searchers had nothing whatever to do with the discovery, except that Mr. Mitchell (Captain Sprye's clerk) having been told by Captain Sprye to go to the Prerogative Office, and there look for the will of Henry Reynell, who died in December, 1824, went accordingly, and found that administration with the will annexed had been granted in March, 1825, to Mrs. Williams Reynell. Then the letter goes on as follows: "Since I wrote you, I have employed my clerks in still further investigating the matter, and to see if it was not possible to do the benefit to you instead of to the other party."

I find it impossible to consider this as being consistent with the truth. Captain Sprye had not nor could have employed his clerks in endeavouring to see if it was not possible to benefit Sir Thomas Reynell instead of the heir. I gave Captain Sprye credit for his statement, that at this time he thought the property would go to Sir Thomas Reynell, only in the event of his surviving Mrs. Williams Reynell, and that, if he should die in her lifetime, it would go to some distant heir—he might therefore truly say to Sir Thomas Reynell that it (that is to say) the question whether * 701 the benefit would go to Sir * Thomas Reynell or to the heir, was doubtful. But what could he mean by saying that it could only be tested by legal proceedings? If he meant, as the context seems to import, that the question between Sir Thomas Reynell and the heir could only be tested by legal proceedings, it was evidently a statement which Captain Sprye could not have made honestly, for he knew, or thought he knew, that whether

the right should enure to the benefit of the one or the other depended not on any legal proceedings, but on the mere fact whether Sir Thomas Reynell should or should not survive Mrs. Williams Reynell. If, on the other hand, he meant to represent that legal proceedings would under all circumstances be necessary, in order to recover the property, whether for Sir Thomas Reynell himself, or for the heir, then also he was making what he could hardly have supposed to be a correct representation of the effect of the will. He had not at that time any suspicion as to the genuineness of the will. The title of Mrs. Williams Reynell for her life was therefore unassailable, as was known to Captain Sprye, and he must also have known that at her death no legal proceedings would be necessary, on the part of the person then becoming entitled, whether that person should be Sir Thomas Reynell or the heir, unless indeed the right then certainly accruing to the one or the other should be wrongfully disputed by some third person, which there was no reason whatever for supposing would be the case. I am aware that in subsequent letters Captain Sprye refers to a bill of discovery, calling on the tenant for life to set out an account of the property, as being the only legal proceeding then immediately necessary, but it is obvious that this is not the suit which Captain Sprye had by his letter of the 29th of April meant Sir Thomas Reynell to understand as being eventually necessary. He had by that letter evidently intended Sir Thomas Reynell to understand that the costs to be incurred * would * 702 or might probably be to an extent at which reasonable men might be frightened, and that they were costs to be incurred in recovering the property. His language is this: "Now, almost all men are frightened at the idea of law proceedings to recover property, and consequently a system has grown up," and so on. It is plain, therefore, these were not the costs of the bill of discovery afterwards suggested, and which Captain Sprye in his letter of the 10th of May says would not amount to 20*l*. That Sir Thomas Reynell so understood Captain Sprye is plain from his letter of the 1st of June, which contains the agreement to give half the property. He there says (referring to several different proposals for division which had been made), "I feel satisfied that the first proposed arrangement, whereby I meant to engage to give up the half of the property recovered, subject to no law expenses, either on success or failure of the suit, is the best for me to pursue,

and I therefore agree to it." Captain Sprye must therefore have been aware that Sir Thomas Reynell supposed from what had passed between them that the subject about which they had been treating was property to be recovered or not to be recovered in some suit at law or in equity, according as success or failure might attend that suit. This was in truth the only reasonable construction to be put on the language of the letter of the 29th of April. Captain Sprye must have intended that this construction should be put on it, and Sir Thomas Reynell's letter of the 1st of June showed plainly to Captain Sprye that he did in fact so understand it, and I consider, therefore, that this was a second misrepresentation, making void all the subsequent treaty founded upon it.

But, thirdly, suppose that this was not so, — suppose, however unaccountable it may be, that Captain Sprye really was so * 703 ignorant of the rights of Sir Thomas Reynell * as to have supposed not only that they were contingent, depending on his surviving Mrs. Williams Reynell, but also that they could only be eventually established by doubtful and expensive litigation ; yet I am satisfied that these errors were afterwards cleared up — that Captain Sprye acquired the knowledge of the true nature of Sir Thomas Reynell's rights, and that nevertheless, having done so, he suffered Sir Thomas Reynell to continue in ignorance as to the nature of his interest, and to continue the negotiation on the footing of that interest being such as Captain Sprye had originally represented it. I assume that at the time when the negotiation was opened and for several weeks afterwards, Captain Sprye fully believed that Sir Thomas Reynell would take no interest himself, unless he survived the tenant for life ; it was therefore no fraud in him to represent to Sir Thomas Reynell that the nature and extent of his interest were such as he supposed them to be. But having made such a representation, and knowing that Sir Thomas Reynell was negotiating on the footing of his interest being such as it had been represented to him, Captain Sprye was, on the most obvious principles of justice and fair dealing, bound as soon as he discovered his mistake, as soon as he found that the interest of Sir Thomas Reynell was much more valuable than he had described it, to explain the mistake to Sir Thomas Reynell, so as to enable him, if he should think fit, to put an end to the pending treaty.

That this was not done is, I think, apparent from all the circum-

stances of the case. Mr. Stinton's opinion, which was obtained on the 15th of June, stated as of course it must state, that Sir Thomas Reynell had a vested remainder in fee expectant on the life-estate of Mrs. Williams Reynell, and subject to certain contingent estates known by all parties to be interests which * might * 704 practically be disregarded as being of no value whatever.

Captain Sprye says in his first answer that this opinion was communicated to him on the 16th of June, and that he was then for the first time informed what the interest of Sir Thomas Reynell in the estate was. In his second answer he says, a copy of the opinion was sent to him, unaccompanied by any note or other memorandum, and he denies that he then fully understood the nature of Sir Thomas Reynell's rights. This denial, it will be observed, is made in very guarded terms; he only says that he did not then fully understand what Sir Thomas Reynell's rights were, but in his former answer he had said that he was then first informed of what the interest of Sir Thomas Reynell was.

Now, taking the two answers together, the reasonable inference appears to me to be, that Captain Sprye at this time, by means of the opinion of Mr. Stinton, had at least ascertained that the interest of Sir T. Reynell was far more valuable than it had been originally supposed to be, and so that he had led Sir T. Reynell into a treaty on an erroneous representation as to his rights. Under these circumstances it was the bounden duty of Captain Sprye immediately to put Sir T. Reynell on his guard, to explain to him that he had up to that time unintentionally misled him, that consequently he was free to disregard all that had been done up to that time, treating it as having been founded in error. Did he do this? Nothing of the sort. On the contrary, I find that on the 16th of June, after he had got the copy of Mr. Stinton's opinion, he wrote a long letter dated on that day at 10 o'clock P. M. to Sir T. Reynell, in which he does not even state that the opinion had been obtained; he says, indeed, that he has had on his desk the * case which had been submitted to counsel, hoping * 705 that he, Sir T. Reynell, might look in and see it. But this could hardly have been the case with the opinion, for what had been sent to him was, as he states, merely a copy of the opinion. At all events, though he writes a long letter, many passages in which satisfy me that he had then seen the opinion, and, to a great extent, understood its import, yet he does not give any hint to Sir T. Rey-

nell as to how much more beneficial an interest he possessed according to the opinion of Mr. Stinton than had been originally represented by Captain Sprye in the letter of the 29th of April.

I cannot but consider the omission, immediately and at once to call Sir T. Reynell's attention to the effect of the opinion, as affording very cogent evidence that he never intended to set him right as to the real nature of his interests. If he did not at once put him on his guard when he wrote to him at great length as soon as he got the opinion, what reason is there for supposing he would do so afterwards? I can discover none. There is no evidence of his having done so. The probability, as he did not do so at first, is, that he would not do so afterwards, and I think that in the subsequent correspondence I discover satisfactory, I might say irresistible, proof that no such communication ever was made to him. I allude particularly to the letters which passed between Captain Sprye and Sir T. Reynell in the month of March following, that is, March, 1844.

[After reading and commenting on this part of the correspondence, his Lordship said:] Let us here pause and consider what is the necessary inference from these letters. The problem to be solved is this: Did Captain Sprye before he obtained the conveyance of the 15th of July, 1843, explain to Sir T. Reynell that in * 706 his * former letter he had made to him an erroneous representation as to his rights; had represented that to be contingent and precarious which he had since discovered to be vested and certain — had led him to suppose that the benefits possibly to accrue to him, could only be recovered through the means of expensive legal proceedings of doubtful result; whereas in fact he would, on the death, without issue, of Mrs. Williams Reynell, succeed naturally and without any law proceedings at all to the whole of the property? This, I say, is the question to be solved; and surely there can be no doubt as to the answer. The letter of the 11th of March is absolutely irreconcilable with the notion that Sir Thomas Reynell was aware of the real nature of his rights. There is no meaning in the passage about his being ready to withdraw when Captain Sprye should find there was no hope of success, if we are to believe that he knew the property would regularly, without any litigation or controversy, devolve on him when Mrs. W. Reynell should die. The letter is well consistent with the

hypothesis that Captain Sprye allowed Sir T. Reynell to proceed all along on the notion that his rights were such as he, Captain Sprye, had originally represented them—it is irreconcilable with the supposition that he had at any time explained to him the real nature of these rights.

It only remains to add, that on receiving this last letter, Captain Sprye still keeps up the same delusion which he had previously created. Instead of saying, as he was bound to do, “What do you mean by hope of success? There is no doubt or difficulty on the subject,—it is quite certain that when Mrs. Williams Reynell dies, we shall succeed to the estate, that is to say, you to one half and I to the other;” instead of saying this, or to this effect, he keeps up the delusion, treats the offer made by Sir T. Reynell to drop the proceedings as * a friendly pro- * 707 posal, but to which he could not listen, not because it was (as in truth it was) absurd and founded on ignorance of the real nature of his interests, but because he, Captain Sprye, “was not of a turn of mind accustomed to yield to difficulties!”

On these grounds, then, I come to the conclusion, that some time before the execution of the conveyance, probably on the 16th of June, Captain Sprye ascertained that Sir T. Reynell had an absolute, indefeasible interest in the property in question, to recover which no legal proceedings whatever would be necessary, and that he nevertheless kept Sir T. Reynell in ignorance of what he had so found out, and allowed him to proceed on the erroneous notion of his rights, as they had been originally represented by the letter of the 29th of April, and those which immediately followed.

I have thus arrived at the conviction, that in three distinct respects, Captain Sprye misled Sir T. Reynell in the treaty which ultimately led to the execution of the deed of conveyance of the 15th of July, 1843: first, by representing to him that the proposal to share the property was one usual among men of character, and one on which Mr. Yonge had proposed to act; secondly, by leading him to believe that the benefits to be obtained for him or his heir, could only be so obtained, if at all, through the medium of doubtful and costly litigation; and, thirdly, by not explaining to him, after Mr. Stinton’s opinion had been obtained, that his interest was not contingent, as he had originally described it, but an absolute, indefeasible interest, subject only to the chance of Mrs. Williams Reynell leaving issue.

Every one of these considerations would be material ingredients towards enabling Sir T. Reynell to form his judgment as to whether he should or should not accede to the proposal of Captain Sprye. If he had not received what was equivalent to an assurance that Mr. Yonge considered the proposed division of the property as the usual course of conducting business on such occasions, and if he had not been led to suppose that his interest was contingent, depending on the chance of his surviving Mrs. Williams Reynell, and then only to be recovered by expensive and doubtful litigation, it may well be that he would not have acted as he did; perhaps he might, perhaps he might not. But this is a matter on which I do not feel called upon or indeed at liberty to speculate. Once make out that there has been any thing like deception, and no contract resting in any degree on that foundation can stand. It is impossible so to analyze the operations of the human mind as to be able to say how far any particular representation may have led to the formation of any particular resolution, or the adoption of any particular line of conduct. No one can do this with certainty, even as to himself, still less as to another. Where certain statements have been made, all in their nature capable, more or less, of leading the party to whom they are addressed to adopt a particular line of conduct, it is impossible to say of any one such representation so made, that even if it had not been made, the same resolution would have been taken, or the same conduct followed. Where therefore in a negotiation between two parties, one of them induces the other to contract on the faith of the representations made to him, any one of which has been untrue, the whole contract is in this Court considered as having been obtained fraudulently. Who can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed? The case is not at all varied by the circumstance that the untrue representation, or any of the untrue representations, may in the

* 709 * first instance have been the result of innocent error.

If, after the error has been discovered, the party who has innocently made the incorrect representation, suffers the other party to continue in error and act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in the contemplation of this Court, a fraudulent misrepresentation, even though it was not so originally.

These are all principles of such obvious justice as to require neither argument nor authority to illustrate or enforce them, and they need but to be stated, in order to command immediate assent. The only question can be in each particular case, how far the facts bring it within the principle. I have already pointed out several particulars in which I think these principles apply to the present case; and, therefore, without inquiring whether there are or are not other instances of misrepresentation fatal to the case of Captain Sprye, I feel bound to say that I concur with Sir JAMES WIGRAM in his conclusion, that the conveyance of the 15th of July was obtained by fraud, and so must be set aside.

It would not be right that I should leave unnoticed an argument much pressed at the bar, and which carries with it a semblance of justice, but to which I have not felt it possible to yield my assent. It was said that during the whole of the negotiations Captain Sprye not only left Sir Thomas Reynell at perfect liberty to consult his friends and professional advisers, but even on several occasions recommended him to do so. To a great extent this certainly was the case; and if the relief sought in this suit had rested on mere mistake, if Captain Sprye had not by misrepresentations of fact, which I cannot treat as unintentional, led Sir Thomas Reynell to believe that his rights were different from what in * truth they were, it may be that the argument to which * 710 I am now adverting would have prevailed. In such a case, perhaps, this Court might have considered that it was the folly of Sir Thomas Reynell to have acted without advice, and might have refused to assist any person who was so singularly little alive to his own rights. *Qui vult decipi*, it is said, *decipiatur*. But no such question can arise in a case like the present, where one contracting party has intentionally misled the other, by describing his rights as being different from what he knew them really to be. In such a case it is no answer to the charge of imputed fraud to say, that the party alleged to be guilty of it recommended the other to take advice, or even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defence to the other. No man can complain that another has too implicitly relied on the truth of what he has himself stated. This principle was fully recognized

in the case of *Dobell v. Stevens*, (a) referred to by my learned brother in the course of the argument.

The reasoning by which I have satisfied myself of the plaintiff's right to set aside the conveyance, also disposes of that part of the bill of Sir Thomas Reynell, in which he seeks to have the contract for the purchase of the other moiety delivered up and cancelled, and also of the cross suit. For, independently of all other objections to that contract, it is clear Captain Sprye having, by what I must consider as fraud, put Sir Thomas Reynell in the position of being the owner of a moiety instead of the entirety, could never deal for the purchase of that moiety. Such dealing is in * 711 truth but a continuation of the original * fraud, and on that short ground I am clearly of opinion that the contract of the 14th of May, 1844, must be considered as having been obtained by fraud, and must be delivered up to be cancelled, and that the cross bill filed for the purpose of enforcing a specific performance of that contract was properly dismissed with costs.

My learned brother has pointed out some trifling additions which ought to be made in the decree, but this does not go to the substance of the case; and we both therefore concur in the opinion that the costs of this rehearing must be borne by Captain Sprye.

* 712

* SPRYE v. REYNELL.

1852. March 25, 26. Before the LORDS JUSTICES.

The plaintiff, in a cross suit, in which, as well as in the original suit, a decree had been made against him, with costs, moved for a further production of documents (which had been, as he alleged, withheld from him by reason of untrue statements in the answer), and for leave to file a supplemental bill in the nature of a bill of review. The motion, as regarded the documents, was refused, with costs; but, by consent, leave was given to file a supplemental bill, on the plaintiff depositing 50*l*. The supplemental bill was filed, and, pending the hearing of the appeal in the original suit, the defendants moved that all proceedings against them for want of answer in it might be stayed till after the plaintiff had paid the costs of the motion (for non-payment of

(a) 3 B. & C. 625.

which he was in contempt), or otherwise that the time for answering might be enlarged. The time was enlarged for four weeks, without prejudice to an application to stay proceedings. After the original decree had been affirmed, with costs, the defendants moved that all proceedings in the supplemental suit might be stayed until after the plaintiff should have paid the costs of the first-mentioned motion, and also of the original and cross suits (for non-payment of which last-mentioned costs he was also in contempt). *Held*, that the motion was properly refused as regarded the latter costs, on the ground of acquiescence; but that, as regarded the former, the order ought to have been made.

IN pursuance of the leave granted by the order made on the hearing of the motion, reported *ante*, p. 656, Captain Sprye, on the 15th of January, 1852, deposited 50*l.* and filed a supplemental bill in the nature of a bill of review against Lady Elizabeth Reynell, Mr. Lawrence Walker, Mr. Arthur Walker, and Mr. Charles Wilson.

Attachments had been sealed against Captain Sprye for non-payment of the costs ordered to be paid by him by the original decree of the 6th November, 1849, (a) and by the order of the 20th of November, 1851. (b)

The time for answering the supplemental bill being about to expire, application was made to the Master in the supplemental suit on behalf of Lady Elizabeth and Mr. Lawrence Walker, and Mr. Arthur Walker, that the time for their answering might be enlarged for *six weeks after Captain Sprye *713 should have cleared his contempt for non-payment of the costs directed by the order of the 20th of November, 1851, or for four weeks further time to answer. The Master refused the application with costs, thinking that the proper course was to apply to the Court. On the second of March a motion was made on behalf of these defendants before Vice-Chancellor PARKER, that all proceedings against them for want of an answer might be stayed until four weeks after Captain Sprye should have paid to them the costs directed to be paid by him by the order of the 20th of November, 1851, or in case the Court should not think fit so to order; then that the applicants might have four weeks further time to answer. The plaintiff, Captain Sprye, did not appear upon this application, of which short notice was given by special leave. The Vice-Chancellor made an order, giving four weeks further time, without

(a) See 8 Hare, 272.

(b) *Ante*, 659.

prejudice to an application to stay the proceedings in the suit. The Vice-Chancellor mentioned as a reason for making no further order, that very short notice had been given.

On the 8th of March a motion was made before Vice-Chancellor PARKER in the supplemental suit, on behalf of the same parties, that all proceedings in that cause against the defendants, the Walkers, for want of their answers might be stayed until three weeks after Captain Sprye should have paid to them the costs directed to be paid by him by the order of the 20th of November, 1851, and should have cleared his contempt, and that all proceedings against Lady Elizabeth Reynell for want of her answer might be stayed until three weeks after the plaintiff should have paid not only those costs, but also all other costs in the causes of *Reynell*

v. Sprye and *Sprye v. Reynell*, for non-payment of which * 714 Captain Sprye was * then in contempt, until he should have cleared his contempt. The Vice-Chancellor held that the payment of the costs was not by the order of November, 1851, made a condition precedent to be performed before filing the supplemental bill, and refused the motion with costs. Lady Elizabeth Reynell, Mr. Lawrence Walker, and Mr. Arthur Walker, appealed from the decision.

Mr. Lloyd, Mr. Malins, and Mr. Shapter, in support of the appeal. — The terms of Lord BACON's order are these: "No bill of review shall be admitted, or any other new bill to change matter decreed, except the decree be first obeyed and performed: as, if it be for land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone. But if any act be decreed to be done which extinguisheth the party's right at common law, — as making of assurance or release, acknowledging satisfaction, cancelling of bonds or evidences and the like, — those parts of the decree are to be spared until the bill of review be determined, but such sparing is to be warranted by public order made in Court." The whole question was fully discussed in *Partridge v. Usborne*, (a) and Lord ELDON's *dicta* in that case, as well as the authorities there collected, of which *Ruton v. Ayscough* (b) is one very much in point, are

(a) 5 Russ. 233.

(b) Rep. temp. Finch, 162.

strongly in the appellants' favour. So are *Willson v. Bates* (a) and *Price v. Dalton*. (b)

Mr. Bethell and *Mr. Terrell*, for Captain Sprye. — No precedent has been produced, in which proceedings * in a * 715 supplemental suit have been stayed till the payment of the costs of the original suit. No doubt it has been held that a bill of review cannot be filed until the former decree has been executed, but decisions to that effect do not afford precedents for staying proceedings after they have been commenced. Whatever part of the obligation created by the original decree is perfect and complete when the supplemental bill is filed, must be performed; but the non-performance of what was not then complete, could not be made the ground for staying proceedings in the supplemental suit. Here the defendants to the supplemental bill were not, when it was filed, entitled to demand payment of the costs in question.

[They referred in this part of the argument to *Bickford v. Skewes*. (c)]

If, however, the defendants had at any time such right as they now claim, they have lost it by waiver and acquiescence. The supplemental bill was filed on the 15th of January. On the 30th of January, the subpoena for payment of the costs was served. On the 2d of February one attachment issued; on the 19th of February, the other. The defendants applied for further time to answer. We acceded to or did not oppose the application. After that, they could not apply to stay proceedings in the suit. After leading the plaintiff to suppose that he could proceed, it was too late to turn round and seek to stay the suit.

THE LORD JUSTICE KNIGHT BRUCE. — This motion divides itself into two parts; namely, that respecting the general costs of the two suits of *Reynell v. Sprye* and *Sprye v. Reynell*, in which a decree has been made, and that relating to the costs of the motion * in the month of November last. As to the costs * 716 of the motion in November last, my original impression was against Lady Elizabeth Reynell and Messrs. Walker, Grant,

(a) 3 M. & C. 197. (b) Cited in 3 M. & C. 204. (c) 10 Sim. 193.

& Co., or at least against the latter, but the progress of the argument changed that impression. The motion was made in a cause in which Lady Elizabeth Reynell was a party, and relates to the subject-matter of that cause. It sought the production of certain documents for the purpose of a rehearing or an application for a rehearing, pending an appeal. It moreover asked leave to file after the decree a supplemental bill, and it made parties to that motion four gentlemen, describing them by the names of Messrs. Walker, Grant, & Co. The Court, on that occasion, adjudicated without any consent, I believe, as to this part of it, that Captain Sprye, who made the motion, should pay the costs of it; that is, the costs of Lady Elizabeth Reynell and of these gentlemen, a direction forming part of the order which gave leave to him to file the present bill. Those costs not being paid, the condition annexed to the order has not been fulfilled. The order not being complied with, my learned brother and myself are of opinion that as the subjects are so intimately connected together, there is a right on the part of Lady Elizabeth Reynell, and on the part of two of the solicitors whom I have mentioned, parties to the present bill, to stay the proceedings under the present bill, until those particular costs shall have been paid; namely, the costs given to Lady Elizabeth Reynell and to Messrs. Walker, Grant, & Co., by the order of the 20th of November, 1851.

Nothing has taken place to waive the right to the payment of those costs, for they have been claimed on every occasion. As I understand, they were claimed before the Master, and they were claimed on the application to the Vice-Chancellor Sir JAMES *717 PARKER, under *which he made the order now appealed from. With respect, however, to the general costs of the suits, *Reynell v. Sprye* and *Sprye v. Reynell*, in which the decree was made, it is arguable whether a case of waiver has not been established, and therefore as to so much the Court will hear the reply.

THE LORD JUSTICE LORD CRANWORTH. — What my learned brother has said represents precisely the view which I take.

Mr. Lloyd, in reply. — The defendants did not put in their answers on account of the appeal in the original suit standing for judgment. They did nothing which amounted to acquiescence,

for no act or omission on their part was more applicable to one course of proceeding than the other. As to the costs of the motion, they were mentioned in the applications which the defendants made, because there was no appeal from the order upon the motion. The costs of the suit were not referred to, only because they were the subject of the then pending appeal.

THE LORD JUSTICE LORD CRANWORTH. — My learned brother and myself are both of opinion that with respect to these costs, that is, the general costs of the suit, — excluding the costs of the order of the 20th of November last, — there has been that which amounts to a waiver on the part of Mr. Lloyd's clients.

Suppose the application for time had been not for four weeks after any particular act to be done, but simply for four weeks further time to answer, that would have been a waiver of any right to stay the proceedings. This is not disputed. Now the actual application was * to stay proceedings for want of * 718 answer until four weeks after a particular act was done ; that was not an absolute waiver ; it was no waiver of that particular act being done, but that particular act being done, the effect of the application was the same as if it had been simply an application for time. We think that the motion ought to be granted, with reference to the costs of the motion of the 20th of November last, and refused as to the more extended application. As the application is to be partly granted and partly refused, the proper course will be that the order should be made without any costs in the Court below, and without any costs now. All proceedings against Lady Elizabeth Reynell and the Messrs. Walker will be stayed until three weeks after the plaintiff shall have paid the costs given by the order of the 20th of November last.

The Lord Justice KNIGHT BRUCE concurred.

* 719 * In the Matter of RICHARDS, an alleged lunatic.

1852. March 30. Before the LORDS JUSTICES.

Where a petition for a commission of lunacy stated that the alleged lunatic had been of unsound mind for upwards of thirty years, a *cestui que trust*, under a settlement made during this period, was allowed to attend the execution of the commission, upon an undertaking to abide by such order as the Court might make as to any increased costs occasioned by the attendance.

THIS was the petition of an infant by his next friend for leave to attend the execution of a commission *de lunatico inquirendo*. The petition stated that, by an indenture dated the 14th of January, 1842, the alleged lunatic had settled property upon trust for himself for life, with a limitation over to the father of the petitioner for life, and a subsequent limitation to the petitioner for life, with limitations over. The petition for the commission stated that the alleged lunatic had been of unsound mind for thirty-five years past. The petitioner's father, who was a first cousin of the alleged lunatic, was dead, and the petitioner was apprehensive that his interests would be prejudiced unless he were permitted to be represented at the execution of the commission.

Sir W. P. Wood and *Mr. Locock Webb*, in support of the petition, cited *In re Nesbitt*. (a)

Mr. Karlake, for the petitioner for the commission, contended that the only ground for allowing any one to attend the execution of a commission of lunacy was the protection of the interests of the alleged lunatic: *Ex parte Snook*, *In re Watts*; (b) whereas the ground on which this petition was presented was merely that the petitioner apprehended that injury would result to himself if the execution of the commission were not attended on his behalf.

* 720 * THE LORD JUSTICE KNIGHT BRUCE. — Speaking for myself, I should have been disposed, without the authority cited in support of the petition, to grant the prayer. My impression is that as counsel I have attended the execution of a commission for the sole purpose of seeing that the lunacy was not carried back

(a) 2 Phill. 245.

(b) 1 Phill. 514.

beyond a certain date, on behalf of persons interested so far only. If the petitioner's next friend will undertake to abide by any order the Court may make as to any increase of costs that may be caused by the attendance at the inquisition, I am disposed to give leave to the infant by his next friend to attend. The lunacy is alleged to have existed for thirty-five years.

THE LORD JUSTICE LORD CRANWORTH. — I consider that the order should be made on the undertaking spoken of by my learned brother being given.

The undertaking was given, and the order made.

* LORD JAMES STUART *v.* THE LONDON AND * 721
NORTH-WESTERN RAILWAY COMPANY.

1852. April 19, 20, and May 4. Before the LORDS JUSTICES.

Heads of agreement were signed by agents, on behalf of a railway company, which was soliciting a bill in Parliament for a branch line, and an opposing land-owner. Among other stipulations, they provided that 400*l.* per acre was to be paid "for the land required" in one set of parcels, other sums for the "land required" in other sets of parcels, and 1000*l.* for depreciation of homesteads. On these heads being signed, the land-owner withdrew his opposition, and the bill passed in July, 1847. It limited the time for completing the line to five years from the passing of the Act. In September, 1847, the solicitors of the land-owner sent to the company the draft of a proposed and more detailed agreement, in order that such an agreement might be formally executed by the company. After repeated applications to them to have the draft agreement returned, the company's solicitors, in October, 1848, stated that the matter was not pressing, as there was no present intention of making the line. In December, 1848, the company's solicitors returned the draft agreement, so settled as to make it conditional on the formation of the railway. The land-owner's solicitors immediately objected to this construction of the heads of agreement; and on the 30th of January, 1849, stated, that unless the company were prepared to execute an absolute agreement, proceedings would be taken at once to compel the formation of the line. In February, 1849, the company expressed (by their solicitors) their intention to abide by the alterations in the draft agreement, and to accept service of any process. In July, 1850, the land-owner filed a claim for specific performance.

Held, that the agreement was not sufficiently definite to be enforced.

That the delay was a sufficient answer to the suit.¹

That the remedy by way of specific performance failed for want of mutuality, and by reason of an action at law affording complete justice.²

On the defendants undertaking to admit in an action that the heads of agreement were adopted under their corporate seal, the claim was dismissed.

THIS was an appeal from the decree of the Master of the Rolls for the specific performance of the following written agreement which had been entered into on behalf of the late Marquis of Bute, with Mr. Driver, as the agent of the London and North-Western Railway Company.

The company were, at the time of the agreement being signed, soliciting an Act of Parliament, to enable them to construct the branch line mentioned in the agreement, and the marquis was a petitioner against the bill.

"Heads of agreement for the purchase of the Marquis of Bute's land required by the above railroad, 1st April 1847.

"No. 1, *A.* Nos. 97, 98, 99, 101, 102, and 103. 400*l.* per acre for the land required, and the several portions to south of railway, and 100*l.* in addition for making road. Passenger archway under the railway between Nos. 97 and 98, and right of footway alongside of river from archway to No. 103.

"No. 2, *B.* Nos. 108, 108*a*, 108*b*, 109, 109*a*, 109*b*, 117. 1250*l.* per acre for "seven acres," extending from Love Lane to the street called North Street, and from the Hitchin Road to the road to High Town, and the intervening roads to be measured in. If, under the powers which Lord Bute and the company possess, such intervening roads (except in front of the house built at the corner of Bute Street) cannot be stopped up, 1300*l.* per acre to be given for the above quantity, except all to the east of Bute Street.

"No. 3, *C.* Nos. 125, 126, 129, 130, 137, and 138. 400*l.* per acre for the land required; the whole of 129 and 126 down to and inclusive of the proposed diversion of the road to the north side

¹ See *Williams v. St. George's Harbor Co.*, 2 De G. & J. 547.

² See cases in notes to *Webb v. The Direct London and Portsmouth Railway Co.*, *ante*, 521; *Hawkes v. Eastern Counties Railway Co.*, *post*, 737, and notes to that case; *Mayor of Norwich v. The Norfolk Railway Co.*, 4 El. & B. 397; *Gage v. New Market Railway Co.*, 18 Q. B. 457; *Gooday v. Colchester, &c., Railway Co.*, 17 Beav. 132.

thereof. The diverted road to be thirty feet wide, and made in a good and substantial manner. The severed portions of 130 and 137 to the north, and the whole of No. 138, to be taken at the same price. The footpath for the use of the miller, six feet wide, to be given along the south side of the river, and the mill-tail to be preserved, and a culvert for the overflow from the mill-head to the Bedford Road, in its present course.

"No. 4, *D.* Nos. 164, 166, 167, 169, 149, 158, 161, 163, 172, 172*a*, 174, 176. 250*l.* per acre for the land *re- * 723 quired. 1000*l.* for depreciation of homesteads. The road No. 166 to be preserved, and a road the width of the road 172*a* to be given on the south side of the railway from 166 to 172*a*. The roads Nos. 166 and 172*a* to be measured in, and a road eighteen feet wide to be made on north side of railway from 160 to south-west corner of 163, in the place of 160.

"The above prices refer to the quantities of land required for the railway, and to the contents of the roads and severed portions which are respectively to be accurately measured. Lord Bute to have the first refusal of all severed lands purchased by the company of other proprietors, when such severed lands adjoin his Lordship's property. The tithe, rent-charge, and land tax to be apportioned and borne by the company. The company to supply all necessary culverts for proper drainage, the same to be built by the company, and also all necessary communications. The same prices per acre to be given for the adjoining portions, if required by the company.

(Signed)

"EDWARD DRIVER,

"Agent for the Railroad Company.

"T. COLLINGDON,

"Agent for the Marquis of Bute.

"Witness, WILLIAM GASCOIGNE ROY."

At the end of the agreement was a memorandum in these words:—

"It is expressly understood that all the premises comprised in the sections A., C., and D., are only held by yearly tenants, so that the company shall have no other interests to negotiate for, and that the tenants of the cottages and gardens in section C. are considered to be monthly holdings, and those in section B. are in the

hands of Lord Bute, and that all the tenants are commencing at Michaelmas."

* 724 * Upon the execution of this agreement, the marquis abandoned all further opposition to the bill, which received the royal assent on the 9th of July, 1847.

By the 13th section it was enacted, that the powers of the company for the compulsory purchase of lands for the purposes of the Act should not be exercised after the expiration of three years from the passing of the Act; and by the 14th section it was enacted, that the railway should be completed within five years from the passing of the Act, and that on the expiration of such period, the powers by that Act or the therein recited Acts granted to the company, for executing the railway, should cease to be exercised, except as to so much of the railway as should then be completed.

On the 1st of September, 1847, the marquis's solicitors sent to the company's solicitors a draft of a proposed more formal and detailed agreement, with the following letter:—

"We send you herewith for perusal, on behalf of the company, a draft of this agreement, prepared to carry out the heads, signed by Mr. Driver on behalf of the company, and by Mr. Collingdon on behalf of Lord Bute. Mr. Driver will be able to supply particulars for the plan, without which the agreement could not be framed with a sufficient particularity."

Afterwards the marquis's solicitors applied to the company's solicitors as follows:—

"We beg to call your attention to these drafts, which we shall be glad to have approved at your early convenience. We are, &c., Roy & Co., 21st September, 1847."

* 725 In the same month, letters were exchanged between * the solicitors, on the subject of a plan which was to accompany the agreement.

On the 11th of December, the marquis's solicitors urged the company's solicitors to complete the agreement, whereunto the latter replied as follows:—

“In reply to your letter of the 11th instant, we beg to say, we have no instructions on the subject of the agreement with the Marquis of Bute; and we apprehend that the bill now passing through Parliament will have the effect of suspending all operations upon the Luton and St. Alban’s branch for the next twelve months. 14th December, 1847.”

The marquis’s solicitors replied as follows : —

“The agreement of which we sent you a draft, on the 1st September last, was identical in its provisions with the one signed by Mr. Driver on the part of the company some weeks previously; and what we are instructed by Lord Bute in all such cases is to take the usual course of getting an agreement in formal shape, sealed by the company as soon as its Act is passed. We are not aware of any provision in the railway bill to which you refer, which can have the effect of delaying our completing this agreement; and as it is Lord Bute’s wish that it should not be delayed, and we are not aware that there is any reason why it should, will you, if you cannot urge any, be good enough to return us the draft approved at your earliest convenience, it having been in your hands (you will find) nearly four months. We are, &c., Roy & Co. 14th December, 1847.”

To this letter the company’s solicitors replied as follows : —

“We have misunderstood the purport of your note, * which we supposed had reference to the completion of the * 726 purchase, and not of the agreement; there is no reason why the latter should not be perfected, and we will look up the papers and give it our early attention. 16th December, 1847.”

On the 1st of March, 1848, the marquis’s solicitors again wrote to the company’s solicitors requesting to have the draft returned.

On the 18th of March, 1848, the marquis died, having devised to the plaintiffs as trustees, upon trusts for sale, among other hereditaments, the lands mentioned in the heads of agreement.

On the 10th of October, the solicitors of the late marquis, who were also the solicitors of the devisees, wrote to the company’s solicitors a letter containing the following passage with reference to the draft agreement : —

"We have waited on you, and written to you times without number, to urge upon you to proceed with it: and having received hitherto no attention, you must consider that this further and last request is dictated solely by feelings of courtesy to yourselves."

To which letter the company's solicitors replied as follows, on the 14th of October, 1848:—

"We are not aware that we have either seen or heard from you on the subject of this agreement, since the death of the late marquis; and there being no present intention on the part of the company to make the line, we certainly have not considered the settlement of this draft as a matter very urgent. As the terms of the arrangement have been reduced into writing, and signed by the surveyors on each side, we should have thought
* 727 * that the matter might safely have rested upon this until something was settled about the making of the line, the expenses incurred by the marquis being of course defrayed by our clients."

On the 6th of December, 1848, they returned the draft agreement, altered so as to be made conditional upon the line being made. They sent with it a letter as follows:—

"We return you this draft with our alterations, although we still think it would have been better to have postponed its completion until something definitive was settled about the line. Before it can be engrossed, the plans must be agreed upon between us, as the one you have sent is very incomplete. The parties will require to be altered, in consequence of the marquis's death, and we must have a short extract from his will to show that the trustees have authority to enter into the agreement."

On receiving these documents, the devisees' solicitors wrote to the company's solicitors as follows:—

"We have received this draft agreement this morning, and your letter of the 6th, the draft having been in your hands since 1st September, 1847. May we beg of you at once to tell us, if you intend to adhere to the alterations made in the draft, whereby it

would be an agreement to sell and purchase conditional on your company determining to make their railway, instead of an absolute agreement for sale and purchase? Our surprise at the alterations we refer to compels us to make this inquiry, to which we must beg your early and explicit reply; which is the more necessary, since the alterations themselves are the first intimation we have received that you intended making them, and you have not given us this until the draft has been in your hands upwards of fifteen months."

* On the 30th of January, 1849, the devisees' solicitors * 728 again wrote to the company's solicitors as follows:—

"Having submitted this matter to the trustees of the marquis, we have received instructions to take proceedings against the company to enforce their rights, unless they are recognized in the manner that we have always held and are advised that they can be maintained; namely, as an absolute agreement for sale and purchase."

To this the company's solicitors, on the 9th of February, 1849, replied as follows:—

"We are instructed to abide by the alterations which we have made in the draft-agreement, and to accept service of any demand or process which you may think proper to issue against the company."

No further correspondence took place till the 15th of June, 1850, when the devisees' solicitors wrote to the company's solicitors as follows:—

"Referring to your letter of the 9th of February, 1849, we shall be obliged by your informing us in the course of Monday, if we may send you process for your undertaking, on behalf of the railway company."

To this the company's solicitors thus replied, on the 17th of June, 1850:—

"In reply to yours of the 15th instant, we beg to say that we have not heard of any occurrence relating to the matter since the date of our letter to you of the 9th February, 1849, and have no alternative but to adhere to the opinion which we then entertained."

In July, 1850, the claim was filed.

* 729 * *Mr. Roundell Palmer* and *Mr. Macnaghten* for the plaintiffs. — This is an agreement absolute in its terms, and sufficiently definite to enable any surveyor to express with certainty all the subjects of it. The only objection which is urged to it is that the defendants have abandoned their intention of making the line, and do not require the land. That is no sufficient defence. *Hawkes v. Eastern Counties Railway Company*. (a) *Webb v. Direct London and Portsmouth Railway Company* (b) is not inconsistent with that authority or with the decision below in the present case, for in *Webb's Case* the time had expired. In the present case, the statutory period will not expire before next July. Moreover, in *Webb v. Direct London and Portsmouth Railway Company*, there was an agreement which could be enforced at law, being under the seal of the company, and one of your Lordships, in the course of the argument, adverted to that circumstance. Here the only remedy is in equity.

They also referred to *Peacock v. Penson*, (c) *Edwards v. The Grand Junction Railway Company*, (d) *Lord Petre v. The Eastern Counties Railway Company*, (e) *Stanley v. The Chester and Birkenhead Railway Company*, (g) *Preston v. The Liverpool, Manchester, and Newcastle Junction Railway Company*. (h)

The Lord Justice KNIGHT BRUCE inquired of the counsel * 730 for the defendants, whether the company were * willing to admit in an action that the heads of agreement, dated 1st April, 1847, were a contract under the common seal of the company, or adopted under their common seal.

(a) 3 De G. & S. 743; *post*, p. 737.

(b) *Ante*, p. 521.

(c) 11 Beav. 355.

(d) 1 M. & C. 650.

(e) 1 Railway Cases, 462.

(g) 9 Sim. 264; 3 M. & C. 773.

(h) 1 Sim. N. S. 586.

Mr. Bethell, Mr. Willcock, and Mr. Speed, for the defendants. — The company are ready to make this admission, and any further admission which the justice of the case may require. We submit that this case is in substance undistinguishable from *Webb v. The Direct London and Portsmouth Railway Company*, which indeed proceeded upon principles well established in this Court, and clearly laid down by Lord REDESDALE in *Harnett v. Yielding*. (a) His Lordship there said: "I have bestowed a good deal of consideration upon this case; and particularly with reference to the jurisdiction exercised by Courts of Equity in decreeing specific performance of agreements. Whether Courts of Equity, in their determinations on this subject, have always considered what was the original foundation of decrees of this nature, I very much doubt. I believe that, from something of habit, decrees of this kind had been carried to an extent which has tended to injustice. Unquestionably the original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed. On this ground, the Court, in a variety of cases, has refused to interfere, where, from the nature of the case, the damages must necessarily be commensurate to the injury sustained." A little further on, speaking of a plaintiff in such a suit, his Lordship said, "He must * also show that in seeking the performance, * 731 he does not call upon the other party to do an act which he is not lawfully competent to do; for if he does, a consequence is produced that quite passes by the object of the Court in exercising the jurisdiction, which is to do more complete justice."

With regard to the distinction attempted to be drawn between the cases, on the ground that in *Webb's Case* the time had expired, can it be seriously argued that it is possible for the defendants to construct the line between this time and the 9th of July?

Independently of this consideration, the agreement is too vague to be enforced. How can the Court define what is meant by "the land required"? The very terms of the agreement show that it was to be conditional. By it 1000*l.* is to be paid for depreciation of homesteads. How can it be said that homesteads are depreciated, if the land is not taken?

[*Mr. Roundell Palmer* said that the plaintiffs would waive their claim to the 1000*l.*]

The real justice of the case cannot only be as well, but much better reached by an action. *Bland v. Crowley*; (a) *Gervais v. Edwards*. (b) Any remedy by way of specific performance is excluded by the lateness of the application.

Mr. Macnaghten, in reply. — The contract has been all along insisted on by the plaintiffs, and it was not till quite recently that the plaintiffs were entitled to suppose that the defendants were *732 endeavouring to escape from their contract. The *letter of the 14th of October, 1848, only said that they had no present intention of making the railway. [He referred to *Clarke v. Moore*. (c)]

THE LORD JUSTICE LORD CRANWORTH. — This case was decided by his Honor the Master of the Rolls on the authority of the case of *Webb v. The Direct London and Portsmouth Railway Company*; ¹ not as that case now stands (it having been brought by appeal to this Court), but as it was according to the decision of it by his Honor the Vice-Chancellor TURNER. As I understand from counsel, the Master of the Rolls seemed to intimate an opinion that but for that authority probably his decision might not have been such as in fact it was. If that be so, inasmuch as that case of *Webb v. The Direct London and Portsmouth Railway Company* has since been decided otherwise than it was decided by Vice-Chancellor TURNER, we have not in fact the duty of substantially overruling any thing that was meant to be decided by his Honor the Master of the Rolls; and we shall be acting in conformity with what would probably have been his opinion, but for a decision which he then thought binding upon him, though in fact that decision has since been overruled.

I think that this is a weaker case on the part of the plaintiff than *Webb's Case* was.

It is perhaps not necessary, perhaps not proper, to give any opinion upon what the construction of the agreement is; but it seems to me doubtful whether there was any binding contract to

(a) 6 Exch. 522. (b) 2 Dr. & War. 80. (c) 1 Jo. & Lat. 723.

¹ *Ante*, 521 and cases in notes.

purchase at all, which was also the case in *Webb v. The Direct London and Portsmouth Railway Company*. Upon that, however, I give no opinion. It may be that there was such a contract, or * it may be there was not such a contract. The * 733 ground on which we proceeded in *Webb v. The Direct London and Portsmouth Railway Company* (a) was this, that whether there was or was not under the circumstances of that case a valid contract to purchase, the facts were such, that it was not fit for this Court to interfere by directing a specific performance, because these two circumstances conspired : first, that complete relief might be obtained at law, if the parties were entitled to any relief ; and, secondly, the principle of mutuality wholly failed ; for it was impossible for the company to hold the land for their benefit in consideration of the money which they were to pay. Now it appears to me that that principle applies precisely in the same way in this case as it did in that.

Supposing that this was a contract by Mr. Driver amounting to a positive engagement, that, if the Railway Act passed, these specific pieces of land (assuming them to be defined) should be taken, and a given sum paid for them : supposing that was so, then the only difficulty which the present plaintiffs are in is this, that this is a contract, not as it was in *Webb v. The Direct London and Portsmouth Railway Company*, (a) binding on the defendants at law, because they had not then power so to contract, but a contract by which the company must be held to have been subsequently bound, on the principle of the case of *Edwards v. The Grand Junction Railway Company*, (b) and others, which were decided on the same principle. It is said that on this ground the interference of this Court is required ; but although that may give a title to relief in this Court, still the only relief which could be given on this ground would be to put the parties in the same situation as they were in in the case of *Webb v. The Direct London and Portsmouth Railway Company*, where, in point of fact, * 734 the company, after the Act of Parliament had been obtained, entered into a contract binding themselves to adopt the contract entered into before the company came into existence. That is the course which appears to me, and, I think, to my learned brother, proper to be taken, and will be the course that will do

(a) *Ante*, p. 521.

(b) 1 M. & C. 650.

substantial justice in this case. It was agreed in the outset that the defendants would enter into any admissions or stipulations that might be necessary to enable the plaintiffs to raise the question at law; and we propose to make an order upon the footing of this agreement.

THE LORD JUSTICE KNIGHT BRUCE. — Perhaps the time which the plaintiffs suffered to elapse after the passing of the Act of 1847, or (if no time before November, 1848, ought to count, then) after October, 1848, before they filed, in July, 1850, the present claim, is fatal to it; but, assuming that not to be so, I am unable to view the case as one for specific performance.

In the first place, if the parties were reversed, could the defendants, as plaintiffs, have obtained a decree for specific performance? This question may be material or immaterial, but against an affirmative answer to it, probably, the mere circumstance of the abandonment of the undertaking, for the purpose of executing which the land in question, or so much of it as in truth was proposed or agreed to be purchased, was so agreed to be purchased, would have formed an insurmountable objection. And it may perhaps be doubted whether to enforce specifically the terms, or any part of the terms of the document before us, that of the 1st of April, 1847, would not, in the actual condition of circumstances, be against public policy, or, in other words, contrary to law.

* 735 * But, setting aside this point also, I am of opinion that the language of the document, in parts of it necessary to be construed and acted upon, if there is to be a decree of any kind for specific performance against the defendants, is too vague, too uncertain, too obscure, to enable this Court to act with safety or propriety for any such purpose. For this, very possibly, the intention of the agents concerned, that a more formal document, not merely by way of conveyance, but by way of contract, should be prepared and executed, may account.

The plaintiffs must, I conceive, be left to proceed at law as they may be advised; they will have the benefit of the concession for facilitating their proceedings there, which the defendants have properly made by their counsel. I need scarcely add, that I think this conclusion perfectly consistent with what I did in the very different case of *Mr. Hawkes*, which was, I continue to be of opin-

ion, rightly determined, and with which, as determined by me, I consider Mr. Webb's case before my learned brother and myself, that is to say, the conclusion at which he and myself arrived on that occasion, also clearly consistent.

May 4.

The undertaking was that, in the event of an action being, before the end of Trinity Term then next, brought against the defendants by or for the benefit or under the direction of the plaintiffs, for the purpose of obtaining damages for the breach of the alleged agreement of the 1st of April, 1847, and such action being prosecuted with due diligence, the defendants would in such action, and for the purposes thereof, admit that on the 10th day of July, 1847, a deed was duly executed by the defendants, under their common seal, whereby they covenanted for *themselves *736 and their successors with the late Marquis of Bute, his executors and administrators, that they would perform all agreements, if any, entered into previously to the 9th of July, 1847, by Edward Driver acting, or purporting to act as their agent for the purchase of any lands from the said marquis to be taken by them for the intended railway, and for compensation to be made for any damage to be occasioned by the railway, in the same way as if such agreements, if any, had been duly entered into by them under their common seal on the day of the date thereof, and as if they had then been duly authorized by law to enter into such agreement or agreements. The defendants also consented to dispense with proffer in such action. Upon this undertaking and consent the claim was dismissed, and any of the parties were to be at liberty to apply to the Court as there should be occasion.

[569]

* 737 *HAWKES v. THE EASTERN COUNTIES RAILWAY COMPANY.¹

1852. November 6, 8, 15. Before the Lord Chancellor Lord ST. LEONARDS.

A railway company applied to Parliament for powers to make a branch between W. and S., with a diverging line to join another railway. They also contemplated a junction with the other railway by means of a more direct diverging line, but this project was not on the deposited plan. The branch between W. & S. intersected the lands of the plaintiff, as to a portion of which he was seised in fee-simple, and as to another portion only for life. The plaintiff opposed the scheme; and in consideration of the withdrawal of his opposition, the company by deed, under their corporate seal, agreed to purchase the whole of his lands, and to obtain the necessary powers for enabling him to convey in fee-simple. The purchase-money was payable eighteen months after the passing of the Act. The agreement was entered into by the company with reference to the projected diverging line not before Parliament, but of this the plaintiff was not aware. The Act passed, limiting the construction of the branch between W. and S. The company abandoned the intention of making the branch, and gave notice to the plaintiff that they did not require any of his land. The bill was filed within three months and a half after the receipt of this notice, and twenty-three months after the passing of the Act. *Held*, that the company were bound specifically to perform the agreement;² and that it was not a valid objection to the enforcement of the contract, that to make a good title would involve the necessity of an application to Parliament.³

THE bill in this case was filed by Henry Hawkes against the Eastern Counties Railway Company, and it prayed the specific performance of the following agreement, which was under the seal of the company.

“Memorandum of agreement made and entered into, this 27th day of May, 1847, between the Eastern Counties Railway Company of the one part, and Henry Hawkes, of Spalding, in the county of Lincoln, of the other part: Whereas the said company are now promoting a bill before Parliament, intituled ‘A Bill to enable the Eastern Counties Railway Company to make a railway from Wis-

¹ S. C., 3 De G. & S. 743; 5 H. L. Cas. 331.

² See *post*, 760 and cases in note (1); *Inge v. The Birmingham, &c., Railway Co.*, 3 De G., M. & G. 658; *Ffooks v. The South-Western Railway Co.*, 1 Sm. & Gif. 142; *Stuart v. The London and North-Western Railway Co.*, 15 Beav. 513; 1 Dart V. & P. (4th Eng. ed.) 50, 176, and cases cited in note (s); *Sugden V. & P.* (14th Eng. ed.) p. 75, and cases cited, p. 80.

³ See *Sugden V. & P.* (14th Am. ed.) 77.

beach to Spalding, and to construct docks at Spalding in connection therewith ;' And whereas the said proposed railway is intended to pass near to the residence of the said Henry Hawkes, situate at Spalding aforesaid, in such a manner as will most seriously damage the same and render it unfit for *habitation ; And * 738 whereas the said Henry Hawkes has hitherto opposed the passing of the said bill into a law, but has consented to withdraw his opposition upon the said company entering into the agreement hereinafter contained : Now it is hereby agreed by and between the parties hereto, that in the event of the said bill in its present or any amended modification or altered form, or the like objects, or any or either of them, and to which the said Eastern Counties Railway Company shall be parties or promoters, passing into a law, the said Eastern Counties Railway Company, their successors and assigns, shall and will purchase, and they do hereby in such case agree to purchase, of and from the said Henry Hawkes and his heirs, and the said Henry Hawkes and his heirs shall and will sell, and he doth hereby accordingly agree to sell, to the said company, their successors or assigns, all that capital messuage or tenement, with the granary, stables, coach-house, hot-houses, conservatories, yards and gardens thereunto adjoining, situate on the north side of the London Road, in Spalding aforesaid, as the same are now occupied by the said Henry Hawkes, and also the pasture adjoining the said garden, also in the occupation of the said Henry Hawkes ; all which said premises are more particularly described in the plan thereof annexed to these presents, and are therein coloured pink, at or for the price or sum of 8000*l.*, to be paid by the said company within eighteen calendar months next after the passing of such bill as aforesaid ; and further, that in addition to such purchase-money or sum of 8000*l.*, the said company, their successors or assigns, shall and will at the same time pay to the said Henry Hawkes, his executors, administrators, or assigns, the sum of 5000*l.* as a compensation for the personal annoyance and inconvenience of compulsory eviction from his said residence ; and shall and will bear, pay, and discharge all the costs of the said Henry Hawkes in relation * to the making out of the title to the * 739 said premises and the conveyance thereof, or in any wise relating thereto. And it is hereby further agreed, that in case from any cause whatever, other than the wilful default of the said Henry Hawkes and his heirs, the purchase shall not be completed at the

expiration of the period of eighteen calendar months after the passing of such bill as aforesaid into a law, the said company shall from thenceforth pay to the said Henry Hawkes and his heirs interest on the said respective sums of 8000*l.* and 5000*l.* at the rate of 5*l.* per cent per annum by even and equal half-yearly payments, from the expiration of such period as aforesaid until the said purchase is completed ; and further that, inasmuch as the said Henry Hawkes, under the will of his late father, is only tenant for life of the said capital messuage, and of the greater part of the said hereditaments, with remainders over in strict settlement, the said company will obtain all such powers and authorities, and do and perform all acts and things, and adopt all such measures and pursue all such courses, either in or by such bill as aforesaid or otherwise, as are, is, or shall or may be necessary or required for enabling the said Henry Hawkes and his heirs, and all other necessary parties, to sell and convey, and the said company to purchase, the said hereditaments and premises from the said Henry Hawkes and his heirs, so as the same may become vested in the said company on payment of the said several sums aforesaid for an estate of inheritance in fee-simple in possession. And whereas the said Henry Hawkes is the owner of a mill and premises used therewith, adjoining the proposed station of the Ambergate, Nottingham, and Boston and Eastern Junction Railway, at Spalding aforesaid ; and it has been arranged as part of the terms upon which the said Henry Hawkes hath consented to withdraw his opposition to the said bill, that the said Eastern Counties

* 740 Railway shall * enter into the agreement hereinafter contained in addition to the purchase of the said property hereinbefore provided for : Now therefore it is hereby further agreed, that in the event of the said proposed railway being made in such manner as to form a junction with the said proposed Ambergate, Nottingham, and Boston and Eastern Junction Railway, in the said parish of Spalding, the said Eastern Counties Railway Company shall and will at their own expense, and before any portion of the said proposed railway shall be open for public traffic, construct a good and sufficient branch or siding from such part of the said mill and premises, as shall be required by writing under the hand or hands of the said Henry Hawkes, his heirs or assigns, into the said proposed station, such writing to be left for the said company at the office of their secretary for the time being ; and shall and will

from time to time, and at all times thereafter, maintain or cause to be maintained in good repair and condition, the rails, points, and other works belonging to such branch or siding, to the satisfaction of the said Henry Hawkes, his heirs or assigns, and shall and will from time to time, and at all times thereafter, permit and suffer the said Henry Hawkes, his heirs or assigns, or other the person or persons for the time being entitled to the said mill and premises, to use and enjoy the said branch or siding without impeachment or interruption, on his or their paying to the said company such tolls or dues as may be duly authorized in that behalf; and, lastly, it is hereby agreed that the said company, whether such bill as aforesaid shall pass into a law or not, or in any event shall within the space of one calendar month pay to the said Henry Hawkes, his executors or administrators, his costs in relation to his opposition to the said bill, and to the treaty and arrangement with the said company, and to these presents, not exceeding in the whole the sum of 30*l*."

* The Act received the royal assent on the 22d July, 1847. * 741 By that Act the company were empowered to purchase any quantity of lands for extraordinary purposes, not exceeding thirty acres, and their compulsory powers were limited to three years. In March, 1848, the abstract of the plaintiff's title was sent to the defendants' solicitor, and in the autumn of 1848 the plaintiff removed from the premises so sold to the company. On the 16th November, 1848, he received a letter of that date from the defendants' agent, informing him that the defendants were desirous of abandoning the formation of the branch railway or of postponing it for many years, and requesting to know whether he would agree to keep his property on receiving compensation. In reply to that letter, the plaintiff, on the 21st November, 1848, positively declined to accept the proposal or any compensation.

On the 27th December, 1848, the solicitors of the plaintiff, by his direction, wrote and sent the following letter to the solicitor of the defendants: "We beg to call your attention to the time appointed by the contract for settling this purchase; viz., the 22d January next; and, as you have not hitherto taken any steps towards the completion, we shall feel ourselves called upon to enforce a specific performance of the contract, if something soon is not done to show an intention to complete within a reasonable time."

The plaintiff's solicitors, on the 18th January, 1849, wrote again to the solicitor of the defendants, in the following terms: "We regret to find we are still without any communication from you, relative to the completion of this purchase, which by the agreement ought to be completed on the 22d instant, from which

date Mr. Hawkes will expect, according to the terms of *742 *the contract, interest at the rate of five per cent per annum on 8000*l.* the purchase, and on 5000*l.* the compensation money, until the same are paid; and this without prejudice to his remedies for enforcing the fulfilment of the contract. We beg, also, to give you notice that Mr. Hawkes has vacated the premises, the subject of the contract, and that the company will be at full liberty to take possession of the same on the 22d instant, and you will consider this as a tender of possession accordingly, and that Mr. Hawkes will cease on that day to exercise any care or control over the property, the subject of the contract; and that he is willing and desirous on his part to complete the contract according to the terms of the same.

"P. S. The abstracts of title which were forwarded to you on the 24th of March last, may be compared at any time with the deeds at our office."

On the 19th January, the defendants' solicitor wrote; appointing an early day for the examination of the abstracts and deeds; this appointment was not kept by the defendants' solicitor. On the 24th January, the plaintiff's solicitors wrote to inform the defendants' solicitor that the key of the plaintiff's premises was in their possession, and that the house, &c., if not attended to, would be injured; and they again wrote on the 6th February, to the same effect, adding, "We shall be glad to provide a person competent to look after the premises, and to have your instruction to do so, failing which, we must take some decisive course in the matter without delay." On the 22d February, the plaintiff received a notice from the secretary of the company, informing him that the company had abandoned their intention of making the railway, and did not require his lands; and that they were advised that they were not compellable to complete the agreement.

*743 Nothing appeared to have *been done by either side from the date of that communication, until the 10th May, when the plaintiff's solicitors wrote the following letter to the solicitor of the defendants: "We send you herewith a supplemental

abstract of the title to the estate of which Mr. Hawkes is seised in fee-simple. We beg to say we have positive instructions from Mr. Hawkes to file a bill for compelling a specific performance of this contract, which we shall do forthwith unless we receive a satisfactory assurance from you that the company, the management of which appears to have lately fallen into other hands, will punctually perform the same without unnecessary delay."

The receipt of this letter was acknowledged, with an intimation that it would be laid before the board of directors of the company. The bill was filed on the 10th June, 1849.

The scheme as originally projected by the defendants and opposed by the plaintiff was to connect the towns of Wisbeach and Spalding, and by a curvilinear diverging line to join a projected line to be constructed by the Ambergate, Nottingham, and Boston Railway Company. The defendants also contemplated a junction, by a direct diverging line, with the proposed Ambergate line; but this scheme was not on the deposited plan. The agreement for the purchase of the plaintiff's lands, altogether about six acres, was entered into by the defendants, with reference to the latter scheme, and with the view of making a joint station with the Ambergate company near Spalding. There was no evidence, however, that the plaintiff was either aware of or actuated by any such motive. Under the Act which the defendants obtained, authorizing the construction of the branch railway between Wisbeach and Spalding, only about two acres of *the *744 plaintiff's land were within the limits of deviation. The Ambergate company not having made their line to Boston or Spalding, the defendants did not require the plaintiff's land for the purposes of the joint station, and they ultimately abandoned their intention of making the branch from Wisbeach to Spalding.

By their answer, the defendants submitted that the Act as obtained authorized them to take about one-third only of the plaintiff's land; and that inasmuch as the remaining two-thirds were not defined in the deposited plans, and were not required for any extraordinary purpose that could be connected with the railway as authorized, and were beyond the limits of compulsory purchase, the company had no power of purchasing such land; that the plaintiff was only tenant for life of the greater part of the property, and could not make a title thereto, and that the company could not hold it, and that therefore the agreement was one which

ought not, and could not be specifically enforced ; that the contract was illegal in its inception, because the company had no power at the time to enter into a contract for such a purpose ; that the capital for making the proposed railway had not been subscribed for, and that the defendants had no funds applicable to the purchase of the plaintiff's lands ; that they had given notice to the plaintiff they did not intend to make it, or interfere in any way with the plaintiff's property ; that they had not purchased, nor did they intend to purchase any lands, with the view to the making of the railway ; and that the purchase-money was most exorbitant.

The cause came on to be heard before the Vice-Chancellor KNIGHT BRUCE, on the 18th March, 1850, when his Honor * 745 decreed a specific performance of the * agreement, with the usual inquiry as to title ; and in making the inquiry, the Master was to have regard to the terms of the contract, and particularly to the clause in it relating to the property of which the plaintiff was mentioned as being tenant for life under the will of his father, and to the provisions of the Lands Clauses Consolidation Act. In pursuance of this inquiry, the Master found that a good title could be made, and was first shown on the 10th May, 1850.

The defendants took several exceptions to this report ; the following were argued : For that the plaintiff, Henry Hawkes, claiming only to be tenant for life of the greater part of the property, is not empowered to sell and convey, and the company is not empowered to purchase and take, such part of the property as is not shown upon the deposited plan of the railway, nor described in the books of reference to such plan, the special Act, and the Lands Clauses Consolidation Act not being applicable to land which is not so shown and described, and the whole property being comprised in one contract, the same cannot therefore be performed :—

For that the powers of the company to purchase and take land are not and have never been in force, inasmuch as the capital proposed to be raised by the Wisbeach and Spalding special Act has not been subscribed for. These exceptions came on to be heard before the Vice-Chancellor KNIGHT BRUCE on the 14th March, 1851, when they were overruled. The case is reported on both points in the third volume of Messrs. De Gex & Smale's Reports, p. 743.

The defendants now appealed to the Lord Chancellor from the

original decree for specific performance, and from the order overruling the exceptions.

* *The Solicitor-General, Mr. Wigram, and Mr. Follett*, * 746 for the plaintiff, in support of the decree. — We submit that it is clearly established that the withdrawal of opposition to a proposed bill in Parliament is a valid consideration for a contract, such as this : *Simpson v. Lord Howden* ; (a) and that, too, whether the contract is made by projectors, who are subsequently incorporated into a company, or by an incorporated company. *Petre v. The Eastern Counties Railway Company*, (b) *Stanley v. The Chester and Birkenhead Railway Company*, (c) *Edwards v. The Grand Junction Railway Company*. (d) One of the grounds on which the defendants resist the specific performance of this contract is, that inasmuch as the plaintiff was only tenant for life of the greater part of the property contracted to be sold, and as more than two-thirds of the property was without the limits of deviation, it was beyond the powers of either the plaintiff or defendants so to contract ; but the 45th section of the Railway Clauses Act, 8 Vict. c. 20, empowers the taking of such lands for extraordinary purposes to the extent prescribed by the special Act, and there defined to be thirty acres, and that in the present case is nearly eight times the quantity not capable of being taken in the ordinary way. The defendants also say that the land is not required for extraordinary purposes, but that is only because they have abandoned the project in reference to which they entered into the agreement. With respect to the defect of the plaintiff's title, it must be recollected that the defendants themselves stipulated to remedy that defect, and they cannot now be released from the fulfilment of that contract, merely on the ground of their * being obliged to apply to Parlia- * 747 ment for further powers. *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company*. (e) It is also clear that a purchaser with knowledge of a defect in the title of the vendor may so act as to waive the objection. *Duke v. Barnett*. (g)

The cases of *Webb v. The Direct London and Portsmouth*

(a) 9 Cl. & Fin. 61.

(b) 1 Railway Cases, 462.

(c) 1 Railway Cases, 58 ; S. C., 3 M. & C. 773.

(d) 1 M. & C. 650 ; S. C., Railway Cases, 173.

(e) 2 Phil. 697.

(g) 2 Coll. 337.

Railway Company, (a) and *Lord James Stuart v. The London and North-Western Railway Company, (b)* will be relied on by the appellants; but without subscribing to the authority of either of those decisions, we submit that they are both distinguishable, inasmuch as there was in each case great laches as well as want of mutuality; in the former case the bill was not filed until after the period within which the compulsory powers of purchasing lands might have been exercised by the company, and in the latter on the eve of the expiration of such powers; whereas in the present case there was more than a year for the exercise of such powers, and the plaintiff filed his bill with the least possible delay.

On the previous hearing of this case before Lord TRURO, (c) it was contended by the defendants that the contract, which was solemnly entered into by the directors of the Eastern Counties Railway Company, was *ultra vires*, and the cases of *Bagshaw v. The Eastern Union Railway Company (d)* and *Cohen v. Wilkinson, (e)* were cited, but those cases clearly have no application, inasmuch as the company, in the present instance, are neither re-

quired to apply the funds of the Eastern Counties Railway
 * 748 * Company as such towards another undertaking, nor are they urged to abandon the greater portion of their line in order that they may devote the capital which was intended for the whole to a fractional part only of the line: besides which the fourth and fifth sections of the special Act expressly recognize the blending of the capital of the projected line with that of the company's capital. (g)

(a) *Ante*, p. 521.

(b) *Ante*, p. 721.

(c) His Lordship resigned the Great Seal without giving judgment.

(d) 2 Mac. & G. 389.

(e) 1 Mac. & G. 481.

(g) Sect. 4. And be it enacted, That it shall be lawful for the said company to raise, for the purposes of the said railway, the sum of 250,000*l.*, by the creation of new shares or stock, in addition to any sums which they are already authorized to raise, upon such terms generally, and in such manner, as may be or may have been agreed upon at any general meeting or meetings of the company specially convened for the purpose, or in such manner as may be or may have been agreed upon between the several persons who have subscribed towards the undertaking hereby authorized, and the said company or the directors thereof for the time being.

5. And be it enacted, That the new shares to be created by virtue of this Act shall be considered part of the general capital of the company, and as such shall be subject to all the provisions of the said recited Acts relating to such general capital, except in so far as such provisions, or any of them, may be in-

Mr. Bethell, Mr. Russell, Mr. Malins, and Mr. Grove, for the company in support of the appeal. — The contract is illegal, invalid, and incapable of being carried into effect; but even if legal and valid, it was contingent on the company requiring the plaintiff's lands; it must be regarded as a whole, and its conditional character is to be inferred from that portion of it which refers to the construction of a siding for the plaintiff's mill, if the diverging line should be made; and if the construction is doubtful, this Court will not decree a specific performance, which is always a matter of discretion, but will leave the plaintiff to his legal remedies. *Harnett v. * Yeilding*, (a) *Flint v. Brandon*, (b) * 749 *Wood v. Griffith*, (c) If, however, the contract is held to have been unconditional, then we say that at the time it was entered into, the directors of the company had no powers to enter into it, and might have been restrained from applying to Parliament for such a purpose. *Ware v. The Grand Junction Water Works Company*, (d) It is well established that whoever enters into a contract with a company constituted by Act of Parliament must at his peril see that the company are acting within the limits of their authority. *M'Gregor v. The Official Manager of the Dover and Deal Railway Company*, (e) *East Anglian Railways Company v. Eastern Counties Railway*, (g) *Gage v. The Newmarket Railway Company*, (h) *Goody v. The Colchester and Stour Valley Railway Company*, (i) The fixing of the seal to the contract, being an act wholly unauthorized, must be treated as null and void; and unless the company subsequently claims the benefit of such a contract, it cannot be enforced against them; the remedy in such a case is against the individual directors who have entered into the contract. *The Charitable Corporation v. Sutton*, (k) *The Attorney General v. Wilson*. (l) The money not being raised for the purposes of the special Act, the application of the funds of the Eastern Counties Company to discharge the plaintiff's claims will be consistent with the provisions of this act, or the terms upon which such new shares shall have been created as aforesaid.

(a) 2 Sch. & Lef. 549.

(c) 1 Swans. 43.

(b) 8 Ves. 159.

(d) 2 Russ. & M. 470.

(e) Exch. Ch. June, 1852 (19 Law Times, 316).

(g) 21 Law Journ. C. P. 23.

(h) Q. B., May, 1852 (19 Law Times, 155).

(i) M. R., April, 1852 (19 Law Times, 334).

(k) 2 Atk. 400.

(l) Cr. & Phil. 1.

be a direct misappropriation of the funds of the company. *Colman v. The Eastern Counties Railway Company*, (a) *Bagshaw v. The Eastern Union Railway Company*, (b) *Cohen v. Wilkinson*. (c)

* 750 * The plaintiff is only tenant for life of the greatest portion of the lands; and unless the Court can compel the defendants to apply to Parliament for the purpose of enabling the plaintiff to convey a good title, it will be idle to decree a specific performance of this contract; but even if this objection were overcome there remains another which is insuperable; namely, that the company have no power to hold what their directors contracted to buy. The equity of the plaintiff is supported by the authorities of *Webb v. The Direct London and Portsmouth Railway Company*, (d) and *Lord James Stuart v. The London and North-Western Railway Company*, (e) as decided in the subordinate Courts, but both those cases have been reversed by the Lords Justices on appeal.

The Solicitor-General, in reply.

November 15.

THE LORD CHANCELLOR. — In the present case a question arises, whether this Court will or not enforce the specific performance of an agreement entered into, during the progress of a bill in Parliament, by a land-owner on the line of a projected railway, for the sale of his property.

[His Lordship here examined at some length the agreement and the special Act, and proceeded :] The line, as it stands upon the parliamentary plan, goes through a part amounting to nearly two acres of the plaintiff's property, and to that extent clearly his property is subject to the provisions of the special Act, and might have been affected by the exercise of the powers conferred by that Act, whether the original line was adhered to, with or without the curvilinear diverging line. Parliament, however, thought

* 751 fit to reject * so much of that curvilinear diverging line as would have enabled the Eastern Counties Company to cross the Great Northern Railway. It appears that the defendants had in contemplation a junction with a proposed line of the Ambergate

(a) 10 Beav. 1.

(d) 9 Hare, 129, and *ante*, p. 521.

(b) 2 Mac. & G. 389.

(e) *Ante*, p. 721.

(c) 1 Mac. & G. 481.

Railway, at or near Spalding, and it was with reference to this scheme that the defendants contracted for the purchase of the lands in the plaintiff's occupation, as that would have enabled them in effect to get to the point they wished to arrive at by the scheme which they feared might not have been sanctioned, and which was in fact rejected. The agreement, it will be observed, contains not the slightest reference to any such intention; and there is nothing in the answer or in the evidence to lead to the supposition that the plaintiff had contracted with such a view.

[His Lordship here adverted to the correspondence, and proceeded :] Mr. Hawkes's solicitors gave a notice to the company's solicitor, that Mr. Hawkes had, on the 18th January, 1849, vacated the premises, the subject of the contract, and that the company had full liberty to enter upon the property. It is impossible to find fault with Mr. Hawkes for going out of possession. He was bound to deliver up possession to the company, and he was under the necessity of providing himself with another residence. It cannot be expected that a man under such circumstances is to wait until the moment he is turned out of possession, and then to seek for a new habitation. The defendants, however, subsequently gave the plaintiff notice that they had abandoned their intention of making the railway, and that they did not require the plaintiff's land. Some further correspondence ensued, and in the result the present bill was filed, and it appears to me to have been filed without any unreasonable delay.

* It was not from any doubt I entertained on the merits * 752 of this case that I postponed my decision, but on account of the important questions of law which were incidentally raised and which I thought required consideration. But it does not appear to me that any of those questions are really involved in the decision of the present case, which I consider to be very plain. The defendants are an incorporated company, competent to bind themselves, and acting undoubtedly within their powers. The property, the subject of the contract, was property a portion of which was directly to be affected by the bill as it stood at the time the agreement was entered into, and that is sufficient to give this Court jurisdiction in the matter. It seems to me preposterous to hold that a company, capable of entering into a contract with reference to a subject before Parliament, and entering into that contract and receiving parliamentary powers enabling them to enforce

the contract, can, by neglecting to exercise their powers, decline to perform the agreement, because either they have allowed their powers to lapse and can no longer exercise them, or because the exercise of such powers is according to their own notion illegal.

On principle I should not have had a moment's hesitation in saying that this was a clear case for specific performance; and the authorities, speaking generally, up to a very late time, admit of no doubt. In the case of *Stanley v. The Chester and Birkenhead Railway Company*, (a) the agreement to purchase being in consideration of the withdrawal of opposition to a bill before Parliament, was considered to be a contract that ought to be

* 753 enforced. That case was followed by *Edwards v. The Grand Junction Railway Company*, (b) and there the incorporated company was held to be bound by the act of the agent of the projectors; a difficulty with which we have not to contend here, because we are dealing now with the company on an agreement under its seal. The case of *Simpson v. Lord Howden* (c) was the next decision; in that case also there was an agreement by projectors, the line, however, was abandoned, yet the contract was enforced: an important question was raised there, as it was in the subsequent case of *Lord Petre v. The Eastern Counties Railway Company*, (d) whether Lord Howden, a peer of Parliament, could properly enter into an agreement, behind the back of Parliament—if I may use the expression—by which he agreed to give up his opposition to the measure for a valuable consideration. It was held, that as there was no pretence for imputing improper conduct on the part of that noble lord, such could not be inferred; that a peer had as much right to enter into a contract, with reference to his property, as if he had not been a member of the legislature. *Lord Petre v. The Eastern Counties Railway Company* (d) was a still stronger case, affirming the principles laid down in the previous decisions, and in that case there was the additional circumstance that the company had permitted the time to expire within which their compulsory powers of purchasing lands were to be exercised.

Upon these authorities I have not the slightest doubt that a

(a) 1 Railway Cases, 58; S. C., 3 M. & C. 773.

(b) 1 Railway Cases, 173; S. C., 1 M. & C. 650.

(c) 1 Railway Cases, 326; 9 Cl. & Fin. 61.

(d) 1 Railway Cases, 462.

bond fide agreement for the sale of lands, enabling a company to promote its views and carry them into effect by the aid of an Act of Parliament (whether * the company may pay a * 754 little more or a little less than the actual value) is perfectly valid. I have no means of measuring the value, but in most of these cases it is of the greatest importance to promoters of railways that they should be enabled to make purchases during the pendency of the bill before Parliament, and thus to get rid of opposition; and under such circumstances having obtained what they wanted, though they may have to pay a little more for their purchase, it is clearly not for this Court to inquire too narrowly into that, or on such grounds to refuse specific performance of the agreement.¹

It was said that there was great hardship upon the general body of shareholders, who had no notice of the arrangement; that subject of hardship on the shareholders is fully considered and dealt with in the case of *Edwards v. The Grand Junction Railway Company*, (a) where Lord COTTENHAM, in meeting the allegation, observes: "It was contended for the railway company, that to enforce this would be injustice to the shareholders of the company, who had no notice of such an arrangement; to which two obvious answers can be given: first, that the Court cannot recognize the rights of individuals interested in the corporation; but must look to the rights and liabilities of the corporation itself."

The defendants have also urged, that there was illegality in the concealment of their intentions from Parliament; the answer to which argument will be found in Lord DENMAN's judgment in the case of *Simpson v. Lord Howden*, (b) where he observes: "It is, indeed, alleged in the plea, that the agreement was secret, and was kept secret; but it was quite consistent with * every * 755

(a) 1 Railway Cases, 173, see p. 199; S. C., 1 M. & C. 650.

(b) 1 Railway Cases, 326, see p. 369; [10 A. & E. 793, 807; 9 Cl. & Fin. 61].

¹ See *Morris and Essex R.R. Co. v. Sussex R.R. Co.*, 5 C. E. Green (N. J.), 542, 566; *Earl of Lindsey v. The Great Northern Railway Co.*, 10 Hare, 664, *Earl of Shrewsbury v. North Staffordshire Railway Co.*, L. R. 1 Eq. 593, 616, 617; *Preston v. The Liverpool, Manchester, and Newcastle-upon-Tyne Railway Co.*, 5 H. L. Cas. 605; 25 L. J. Ch. 421; 1 Sim. N. S. 586; *The Caledonian Railway Co. v. The Magistrates of Helensburgh*, 2 Macq. 391; *Taylor v. The Chichester and Midhurst Railway Co.*, L. R. 2 Exch. 356, 367, 368.

averment in the plea, that both parties may be innocent of any original fraudulent understanding, that the transaction should be kept secret at the time the deed was executed. As the instrument is not upon the face of it fraudulent, as no intention of making any false representation, or concealing any thing, can be collected from any part of it, the facts which make it fraudulent ought to be distinctly alleged; and no such facts are alleged. The subsequent concealment from the legislature might indeed have been used as evidence to the jury of the prior intent to conceal, if that intent had been averred; but such subsequent concealment would be evidence only, and would by no means be conclusive evidence, it cannot be used to supply the want of such distinct averment." Now in the present case there is no such statement; there is nothing here upon the face of the pleadings to show that there was any intention whatever to conceal from Parliament the transaction between the company and the plaintiff, nor, indeed, is there any reason why there should be any concealment; besides, no such case being made by the answer, no evidence could be admissible to prove it.

It was also argued that there would be want of mutuality and great hardship in enforcing the contract against the company after the time limited for the exercise of their compulsory powers had expired; but that argument does not apply to this case, because at the period when this bill was filed the time had not expired, and there was sufficient time to complete the works, even after the period when the bill was filed. The company might have enforced the contract as soon as the Act passed, and they cannot be permitted to avail themselves of impediments of their own creation. The whole fault here lies upon the part of the company. The plaintiff has never been guilty of any neg-

* 756 lect — he has never * swerved from his readiness to perform his contract; but this company, from the beginning to the end of the transaction, have acted with as much bad faith as I ever witnessed upon the part of any public body.

With respect, however, to this last ground of hardship, and assuming that the time had expired, I would refer to the observations of Lord COTTENHAM in the case of *Lord Petre v. The Eastern Counties Railway Company*, (a) where he says: "The hardship

(a) 1 Railway Cases, 462; see p. 479.

complained of is, the expiration of the parliamentary time; but, as I understand the case, the company have brought that hardship upon themselves." That is exactly the observation which I should make in this case, were the facts as alleged by this company.

The defendants also resist the specific performance of the contract, on the ground that it contains an obligation on the part of the company to obtain powers in order to carry the contract into effect, inasmuch as the plaintiff is tenant for life only of a portion of the property; and it was insisted that that was a fatal objection, because the Court would not enforce an agreement which was to depend upon a future application to Parliament; but in the case of *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company*, (a) that objection is answered by Lord COTTENHAM, who says: "By the appeal I am asked to treat this contract as a nullity; that is, to hold that all contracts which parties enter into, not having themselves the power to carry them into effect, and therefore agree to apply to Parliament to give them such power, are so utterly void, that this Court will not even protect * the property until an opportunity * 757 shall have been afforded for an application to Parliament.

The effect of such a decision would be to nullify very many family arrangements entered into, and many with the sanction of this Court, but to give effect to which the powers of Parliament are indispensable. It would also nullify all contracts by projectors of companies before an Act was obtained; but it is now nearly twelve years since, in *Edwards v. The Grand Junction Railway Company*, I gave effect against the incorporated body to a contract entered into by the projectors of it before the Act was passed, but in contemplation of its passing,—that is, a contract which the parties at the time had no power to carry into effect, but proposed to do so by the authority of Parliament; and there are now many cases to the same effect." In these observations I entirely concur, and they appear to me to be a conclusive answer to the objection founded on the necessity of an application to Parliament.

Independently of these general objections, it was insisted that subsequently to the decision of this case in the Court below, the two cases of *Webb v. The Direct London and Portsmouth Railway Company* (b) and *Lord James Stuart v. The London and North-*

(a) 2 Phil. 597; see p. 604.

(b) *Ante*, p. 521.

Western Railway Company, (a) which were said to be identical, had been reversed.

It appears to me that the case of *Webb v. The Direct London and Portsmouth Railway Company* was reversed upon the uncertainty of the contract; and if it was reversed upon any other ground, I should hesitate before I could acquiesce in that decision.

I cannot accede to the doctrine that it is competent for a * 758 company entering * into such a contract as this is, to release themselves upon any grounds of supposed illegality from the contract. If, as in the cases of *Gage v. The Newmarket Railway Company*, (b) and *Goody v. The Colchester and Stour Valley Railway Company*, (c) which have been relied on, the contract was so worded as to be susceptible of the construction that the company were not to pay unless they required the land, which assumes that they are not to pay unless they take the land, the case would be very different. In *Gage v. The Newmarket Railway Company*, some expressions are attributed to the learned Judge, in which I cannot coincide. The result, however, of that case seems only to be that the company could not bind themselves beyond their powers; and in the case of *Goody v. The Colchester and Stour Valley Railway Company*, it was held that there was no binding agreement. Such cases as those may fairly be considered as conditional contracts; but where, as in this case, there is an absolute and unqualified contract to take the land, I am clearly of opinion that no subsequent accident, certainly no subsequent conduct on the part of the company, can relieve them from the obligation they have incurred. The contract must be looked at at the time when it was executed, at all events, at the time when the Act passed; it contemplated the passing of the Act, and the Act did pass in the terms pointed at in the contract. Having regard therefore to the good faith, the truth and honesty of the transaction, it is, in my opinion, a valid contract, and cannot be less binding if entered into before the Act was obtained, than it would have been if executed immediately after the Act passed.

* 759 It was said that in the case of *Lord J. Stuart v. The * London and North-Western Railway Company*, the Master of the Rolls decreed a specific performance upon the authority of *Webb v.*

(a) *Ante*, p. 721.

(b) Q. B. May, 1852 (19 Law Times, 155).

(c) M. R. April, 1852 (19 Law Times, 334).

The Direct London and Portsmouth Railway Company, before it was reversed, and that the reversal of the latter case displaced the authority of the Master of the Rolls in the former, but in the former, as it appears to me, there were two questions: first, whether there was any concluded agreement, any binding agreement, any thing amounting to a positive contract; and next, whether there was not great delay. The appellants have relied upon those two cases as reversed by the Lords Justices. I do not say that either of those decisions was not a proper decision under the particular circumstances of each case, but I say, if they are to be considered as authorities for refusing a specific performance in a case like the present, that I should totally disagree with them. Such would be a new view of the doctrine of this Court, and it is a view which could not be supported consistently with the many authorities to which I have adverted.

One other argument remains to be noticed, that of the alleged illegality in the company applying its funds to purposes not authorized by their Act of Parliament; and the cases of *M'Gregor v. The Dover and Deal Railway Company*, (a) *East Anglian Railway v. Eastern Counties Railway*, (b) and *Bagshaw v. The Eastern Union Railway Company*, (c) were quoted in support of that argument. Those were all cases in which the companies were beyond all doubt exceeding their powers, and the parties contracting with them must be presumed to have had notice of the illegality. Those cases, therefore, have no bearing on the present. In my opinion nothing * can be more indecent than for a great * 760 company like this to allege, by way of defence, that a solemn contract which they have entered into is void on the ground of its not being within their powers, not from any mistake, misapprehension, or subsequent accident, but because they thought fit to enter into it, and meant to have the benefit of it, if it turned out for their benefit, and to take advantage of the illegality in case the contract should prove onerous, and they should desire to get rid of it.¹

(a) Exch. Ch. June, 1852 (19 Law Times, 316).

(b) 21 Law Journ. C. P. 23.

(c) 2 Mac. & G. 389.

¹ In *Brown v. Winnisimmet Co.*, 11 Allen, 331, BIGELOW C. J., said: "The later English authorities seem to sanction the doctrine that such a ground of defence [that stated in the text], although it may be 'unbecoming and ungracious,' or, in the stronger language of Lord ST. LEONARDS, 'indecent,' is

I have postponed my decision on this case until I had examined all the authorities cited. I have taken the opportunity of looking into every authority upon the subject, and I can find nothing to shake the opinion I entertained when the argument was closed that this is a very clear case for specific performance. I am very glad that the authorities are consistent with the justice and equity of the case; and therefore I dismiss this appeal with costs.

nevertheless legal and valid, if it be made to appear, either by the express provisions of an act of incorporation, or by necessary and reasonable implication therefrom, that a contract which is sought to be enforced in an action at law against a corporation is beyond the scope of the powers granted by its charter; or, in other words, that the legislature did not intend that the body created by them should enter into contracts of a character like that which a plaintiff makes the foundation of a claim against it;" and he cites *South Yorkshire Railway Co. v. Great Northern Railway Co.*, 9 Exch. 55, 84, 85; *Bateman v. Ashton-under-Lyne*, 3 H. & N. 323; *Norwich v. Norfolk Railway*, 4 El. & Bl. 397, and cases cited. To which may be added as illustrative of the above doctrine and showing it to be well settled, in cases where it may properly be applied, *Taylor v. The Chichester and Midhurst Railway Co.*, L. R. 2 Exch. 356; L. R. 4 H. L. 628; 4 H. & C. 409; *The East Anglian Railway Co. v. The Eastern Counties Railway Co.*, 11 C. B. 775; 21 L. J., N. S., C. P. 23; *Macgregor v. Dover and Deal Railway Co.*, 18 Q. B. 618; 22 L. J. Q. B. 69; *Bagshaw v. Eastern Union Railway Co.*, 2 M'N. & G. 389; 19 L. J. Ch. 410; *Earl of Shrewsbury v. North Staffordshire Railway Co.*, L. R. 1 Eq. 593; *Chambers v. Manchester and Milford Railway Co.*, 5 B. & S. 588; *In re National Permanent Building Society*, L. R. 5 Ch. Ap. 309; *Gregory v. Patchett*, 38 Beav. 595. A similar doctrine has been recognized and applied by Courts in the United States. *Pennsylvania, Delaware, and Maryland Steam Navigation Co. v. Dandridge*, 8 Gill & J. 248; *Hood v. New York and New Haven R.R.*, 22 Conn. 502; *Pearce v. Madison & Ind. R.R.*, 21 How. (U. S.) 441; *Commonwealth v. Smith*, 10 Allen, 448; *East Boston Freight R.R. Co. v. Hubbard*, *ib.* 459 note; *Whittenton Mills v. Upton*, 10 Gray, 582; *Bangor Boom Corp. v. Whiting*, 29 Maine, 123; *Abbott v. Baltimore and R. Steam Packet Co.*, 1 Md. Ch. 542; *Strauss v. Eagle Ins. Co.*, 5 Ohio N. S. 59; *Bank of Genesee v. Patchin Bank*, 3 Kern. 315; *Downing v. Mount Wash. Road Co.*, 40 N. H. 230, 235; *East Boston Freight R.R. Co. v. Eastern R.R. Co.*, 13 Allen, 422; *The Morris and Essex R.R. Co. v. Sussex R.R. Co.*, 5 C. E. Green (N. J.), 542, 562-564; *SELDEN J.*, in *Bissell v. The Mich. Southern and Northern Ind. R.R. Co.*, 22 N. Y. 258; *Orr v. Lacey*, 2 Doug. (Mich.) 230. See also *Shrewsbury and Birmingham Railway Co. v. North-Western Railway Co.*, 6 H. L. Cas. 113, 137; S. C., 2 M'N. & G. 324; 3 M'N. & G. 7; 4 De G., M. & G. 115; 16 Beav. 441; *Gage v. Newmarket Railway Co.*, 18 Q. B. 457; *Bagshaw v. The Eastern Union Railway Co.*, 2 M'N. & G. 389, note; *The Caledonian Railway Co. v. The Magistrates of Helensburgh*, 2 Macq. 391; *Sugden V. & P.* (14th Eng. ed.) 76.

November 20.

The appeal from the order on the exceptions now came on to be heard.

Mr. Bethell, Mr. Russell, Mr. Malins, and Mr. Grove, in support of the appeal. — Admitting the validity of the contract, we submit that the plaintiff cannot perform it, and there being some portion of the land not within the limits of deviation as to which the plaintiff is tenant for life, and with respect to which he could only have contracted after the enabling clauses of the Lands Clauses Consolidation Act (8 Vict. c. 18) had been brought into operation by the special Act, the decree directing the reference as to title was wrong in incorporating into that reference any allusion *to the Lands Clauses Consolidation Act. No valuation *761 has been made for the protection of the remainder-man. They referred to the 6th, 12th, 14th, and 69th sections of the Lands Clauses Consolidation Act.

The Solicitor-General, Mr. Wigram, and Mr. Follett, contra, submitted, as in their former argument, that the portion of the land in respect of which the plaintiff was tenant for life might be taken for extraordinary purposes under the 45th section of the Railway Clauses Consolidation Act (8 Vict. c. 20), and that it did not concern the vendor to show that it was to be used for such purposes.

Mr. Bethell, in reply.

THE LORD CHANCELLOR. — There is nothing in the contract, or in the negotiation as appears in the correspondence, to show that the defendants had any doubts of their capacity to purchase, and there is no evidence produced to show that the whole of the land might not be legally taken for extraordinary purposes. As to the omission to make the valuation between the tenant for life and the remainder-man, that was entirely the duty of the company, who cannot be permitted to set up their own neglect as an argument for not fulfilling the contract. There is nothing to prevent that apportionment now, and I think therefore that this appeal must also be dismissed with costs.

1852. November 2. Before the Lord Chancellor Lord St. LEONARDS.

THE decree, as drawn up in this case, after the judgment pronounced upon it by the Lord Chancellor Lord TRURO, a report of which will be found in the third volume of Messrs. Macnaghten & Gordon's Reports, p. 635, provided that it should be binding upon Mary Griffin, unless she should within one month after the service thereof on her, show unto the Court good cause to the contrary. The decree was not served on M. Griffin until the 30th June, 1851. Within one month from that time application was made that the cause might be reheard as against her, and the Lord Chancellor (Lord St. LEONARDS) directed it to be set down at the foot of the appeals before him.

Mr. Hardy now insisted, on behalf of M. Griffin, that as she was only the personal representative of R. Ashby, the decree ought not to have affected her personally, but submitted to the ordinary accounts being taken against her.

Mr. Shapter, for the residuary legatees, waived such accounts.

Mr. Teed and *Mr. Craig*, for the executors.

THE LORD CHANCELLOR granted the application, observing that Mary Griffin ought not to have been made personally liable to the obligation imposed on her; but adding that as the mistake was entirely the act of the Court, there ought to be no costs of the application to rectify the decree.

The decree was varied by striking out every thing relating to M. Griffin, and by inserting a statement that the plaintiffs and defendants waived the accounts as against her.

* RODICK v. GANDELL.

* 763

1851. May 6. June 4, 5, 6. 1852. July 21. Before the Lord Chancellor
Lord TRURO.

An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor, will operate as an equitable assignment of such debt or funds.¹

A railway company was indebted to A., their engineer, who was greatly indebted to his banker: the latter having pressed for payment or security, A., by letter to the solicitors of the company, authorized them to receive the money due to him from the railway company and requested them to pay it to the banker: the solicitors, by letter, promised the banker to pay him such money on receiving it. *Held*, that this did not amount to an equitable assignment of the debt.

THIS was an appeal from the decision of the Master of the Rolls dismissing a bill filed on behalf of the bankers of the defendants Messrs. Gandell & Brunton. The question in the suit was, whether a letter written by these last-named gentlemen to Messrs. Pinniger & Westmacott (also defendants in the suit), the solicitors of certain railway companies from whom money was alleged to be due to Messrs. Gandell & Brunton, authorizing them

¹ See *Diplock v. Hammond*, 2 Sm. & Giff. 141; 5 De G., M. & G. 320; *Ex parte Imbert*, 1 De G. & J. 152; *M'Gowan v. Smith*, 26 L. J., N. S. Ch. 9; *Myers v. The United Guarantee and Life Assurance Co.*, 7 De G., M. & G. 112; 3 Lead. Cas. in Eq. (3d Am. ed.) 308 [654] *et seq.* notes to *Ryall v. Rowles*. An order, draft, or bill, drawn for the whole of a particular fund, is an equitable assignment of that fund to the payee, and binds it after notice to the drawee. *Mandeville v. Welch*, 5 Wheat. 285; *Robbins v. Bacon*, 3 Greenl. 346; *Corser v. Craig*, 1 Wash. C. C. 424; *Adams v. Robinson*, 1 Pick. 461; *Legro v. Staples*, 16 Maine, 252; *Johnson v. Thayer*, 17 Maine, 401; *Gibson v. Finley*, 4 Md. Ch. Dec. 75; *Parkhurst v. Dickerson*, 21 Pick. 307; *Blin v. Pierce*, 20 Vt. 25; *SHAW C. J.*, in *Palmer v. Merrill*, 6 Cush. 287; *Walker v. Mauro*, 18 Missou. 564; *Clark v. Mauran*, 3 Paige, 373; *M'Lellan v. Walker*, 26 Maine, 114. But an order or draft for a part only of a debt does not, against the consent of the drawee, amount to an assignment; for the debtor is not to be subjected to distinct demands on the part of several persons, where his contract was one and entire. *Gibson v. Cooke*, 20 Pick. 15; *Mandeville v. Welch*, 5 Wheat. 286; *SHAW C. J.*, in *Palmer v. Merrill*, 6 Cush. 287; *Bullard v. Randall*, 1 Gray, 605; *Chitty Contr.* (10th Am. ed.) 187; *The Hull of a New Ship*, *Davies*, 199; *Bourne v. Cabot*, 3 Met. 305; *Wheeler v. Wheeler*, 9 Cowen, 34; *Buck v. Swarey*, 35 Maine, 41; *Hopkins v. Beebee*, 2 Casey, 85, 88.

to receive such money and to pay it to the bankers, and the solicitors having by letter promised so to do, constituted, as contended by the plaintiff, an equitable assignment to the bankers of the debt. The Master of the Rolls held that it did not, and the plaintiff now appealed to the Lord Chancellor.

The cause as heard before the Master of the Rolls will be found reported in the twelfth volume of Mr. Beavan's Reports, p. 325; and the judgment of the Lord Chancellor enters so fully into the facts of the case, that any further preliminary statement is rendered unnecessary.

Mr. R. Palmer and Mr. J. V. Prior, for the plaintiff. — They contended that the transaction in question constituted
* 764 * a valid equitable assignment, and cited and commented on *Row v. Dawson*, (a) *Yeates v. Groves*, (b) *Ex parte South*, (c) *Lett v. Morris*, (d) *Watson v. The Duke of Wellington*, (e) *Burn v. Carvalho*. (g)

They also submitted that the assent of the solicitors, Messrs. Pinniger & Westmacott, placed them in the situation of a party dealing with property after notice of a charge: *Jones v. Smith*; (h) and that they could not be justified in applying the funds in any manner contrary to the claim of the bankers. *Davis v. Bowsher*. (i)

They further insisted that the bankers were not bound to appropriate the sums coming into their hands from Messrs. Gandell & Brunton, subsequent to the transaction in question, in liquidation of the balance due at the time of the transaction rather than in liquidation of subsequent advances. *Kirby v. The Duke of Marlborough*, (k) *Ex parte Langton*, (l) *Henniker v. Wigg*. (m) They cited also *Ex parte Skinner*, (n) *Fitzgerald v. Stewart*, (o) *Lyde v. Mynn*. (p)

[THE LORD CHANCELLOR, in the course of the argument, referred to *Hunt v. Mortimer*. (q)]

(a) 1 Ves. 331.

(b) 1 Ves. Jr. 280.

(c) 3 Swanst. 392.

(d) 4 Sim. 607.

(e) 1 Russ. & M. 602.

(g) 4 M. & C. 690.

(h) 1 Hare, 43.

(i) 5 T. R. 488.

(k) 2 M. & S. 18.

(l) 17 Ves. 227.

(m) 4 Q. B. 792.

(n) 1 Deac. & Chitty, 403.

(o) 2 Sim. 333.

(p) 1 M. & K. 683.

(q) 10 B. & C. 44.

Mr. Rolt and *Mr. Selwyn*, for the defendant Pinniger (Messrs. Pinniger & Westmacott severing in their defence), and in support of the decision of the Master of the Rolls. — *They * 765 contended that the case of equitable assignment was not established; that, having regard to the position in which Pinniger stood to his partner Westmacott, he had incurred no personal liability: *Barfoot v. Goodall*, (a) *Blair v. Bromley*; (b) and that at all events the plaintiff could have only a legal demand for the moneys come to the hands of the solicitors, and that there was no ground for the interference of a Court of Equity. *Foley v. Hill*, (c) *The South Eastern Railway Company v. Brogden*. (d)

They cited and commented on *Wallwyn v. Coutts*, (e) *Curtis v. Auber*, (g) *Garrard v. Lord Lauderdale*, (h) *Metcalf v. The Archbishop of York*, (i) *Burn v. Carvalho*, (k) *Langton v. Horton*, (l) *Malcolm v. Scott*. (m)

Mr. Bethell and *Mr. G. M. Giffard*, for the defendant Westmacott. — They submitted, first, that nothing had been done which the Court could regard in the light of an equitable assignment, in the proper sense of that term; and secondly, that if there was an assignment at all, it was a security for a debt due at that particular time, and that that debt had been subsequently liquidated.

In reference to the assignability in equity of choses in action, and the necessity of notice in order to render such assignment complete, they cited *Ryall v. Rowles*, (n) * *Jones v. Gibbons*, (o) *Loveridge v. Cooper*, (p) *Williams v. Everett*; (q) and they distinguished the present case from *Row v. Dawson*, (r) and *Burn v. Carvalho*. (k)

They also referred to *Copis v. Middleton*, (s) *Ex parte Fidgeon*, (t) *Walker v. Hardman*, (u) *Henniker v. Wigg*. (v)

(a) 3 Camp. 147.

(b) 2 Phil. 354.

(c) 1 Phil. 399.

(d) 3 Mac. & G. 8.

(e) 3 Mer. 707.

(g) 1 J. & W. 526.

(h) 3 Sim. 1.

(i) 6 Sim. 224.

(k) 4 M. & C. 690.

(l) 1 Hare, 549.

(m) 6 Hare, 570; 3 Mac. & G. 29.

(n) 1 Ves. 348.

(o) 9 Ves. 407.

(p) 3 Russ. 1.

(q) 14 East, 582.

(r) 1 Ves. 331.

(s) Turn. & R. 224.

(t) 4 Deac. 217.

(u) 11 Bli. N. S. 229.

(v) 4 Q. B. 792.

Mr. Follett and Mr. Kinglake appeared for the assignees of Messrs. Gandell & Brunton, who were bankrupts.

Mr. R. Palmer, in reply, cited *Willet v. Chambers*, (a) *Lacy v. M'Neile*, (b) *Wood v. Braddick*. (c)

1852. July 21. .

The following judgment was, on the consent of the parties to take the same, delivered out by Lord TRURO, subsequently to resigning the Great Seal.

This bill is filed in the name of the plaintiff, as the public officer representing a joint-stock bank carrying on business at Liverpool under the firm of "The Liverpool Union Bank," and which bank was a creditor of Gandell & Brunton for an amount of about 3000*l*. The defendants in the original bill were Pinniger & Westmacott, against whom the relief is prayed, and Gandell & Brunton, the debtors to the bank; and, by supplemental bill, Charles * 767 Turner, George Long, and Charles Hutchins, * the assignees nominated under a *fiat* in bankruptcy issued against Gandell & Brunton, were made defendants. By the bill the bank prayed that it might be declared that the Liverpool Union Bank was entitled to have the full benefit of two letters set forth in the bill, and respectively dated the 26th and 27th December, 1845, as an effectual charge by way of equitable assignment upon the debts due to Gandell & Brunton from the railway companies mentioned in the letter dated 26th December, 1845, for the purpose of securing the debt due to the bank not exceeding 3000*l*., and that Pinniger & Westmacott might be decreed to account for and pay either the sum of 3000*l*. to the bank, or the full amount of all sums received by them, or which without their wilful neglect they might have received on account of the debts due to the said Gandell & Brunton from the railway companies to the extent of 3000*l*.

The material facts stated in the bill were, that Gandell & Brunton, who were engineers, were indebted to the bank represented by the plaintiff, and that, to induce the bank to forbear enforcing the payment of the debt, and also to pay other drafts, they agreed

(a) 2 Cowp. 814.

(b) 4 Dowl. & Ry. 7.

(c) 1 Taunt. 104.

to give a charge by way of equitable assignment upon certain debts due to them from the several railway companies named in the bill; that the defendants Pinniger & Westmacott were solicitors to the railway companies, and were employed about the settlement of the claims made by Gandell & Brunton and others against the company, and that Pinniger & Westmacott, at the request of Gandell & Brunton, had agreed to concur in the proposed arrangement with the bank; that Gandell & Brunton, pursuant to the suggestion made by Pinniger & Westmacott, wrote to them a letter, stating, "We hereby request of you, that you will pay into the bank of Messrs. Cunliffe, Brooks & Co., for the Liverpool Union Bank, *all moneys now due to us from the Cheltenham, Oxford, and London Junction Railway," &c., (naming the other railway companies), "and we hereby authorize you to receive such moneys in our names for the purpose, from the different committees: we will thank you to write to the bank, saying you will act on this letter;" that on the 27th December, 1845, Pinniger & Westmacott wrote a letter addressed to the bank, and also to Cunliffe & Co., the London correspondents of the bank, stating, "We have received from Messrs. Gandell & Brunton a letter of which we hand you a copy on the other side: as requested by that letter, we beg to say that we will, on receiving the moneys due to Messrs. Gandell & Brunton from the several railways mentioned, pay them to you to their credit, and that we will effect this as early as possible;" that the letter of Pinniger & Westmacott was handed to the bank by the clerk of Gandell & Brunton, and that, on the 29th of December, the agent of the bank wrote to Pinniger & Westmacott, stating, "I have received your favour of the 27th instant, guaranteeing the payment of all moneys received by you on account of Messrs. Gandell & Brunton into our hands: the amount due to us is under 3000*l.*, on payment of which amount your letter will be given up;" that upon the faith of those letters the bank subsequently paid certain drafts, and that the sum of 3969*l.* 14*s.* 8*d.* had become due to the bank.

The bill then sets forth a lengthened correspondence between the several parties; but I do not think it necessary to detail that correspondence, because I think the question in the cause must be decided by the legal effect of the letters, the contents of which I have stated, and that nothing occurred in that correspondence which can affect the legal rights and liabilities of the parties.

* 769 The earlier part of the correspondence consisted of * inquiries as to the expected receipts of money from the railway companies, and the latter is contentious, the parties stating their views of their respective rights and liabilities under the circumstances which had taken place.

The bill charges that Pinniger & Westmacott received from the railway companies, on account of the debts due to Gandell & Brunton, sums to a much greater amount than the claim of the bank against Gandell & Brunton, and that Pinniger & Westmacott, in breach of their engagements and in violation of the right of the bank, handed over the sums so received to Gandell & Brunton.

The bill concludes with the prayer for a declaration that the bank was entitled to an effectual charge by way of equitable assignment of the debts therein mentioned, and a decree for an account against Pinniger & Westmacott.

The defendant Westmacott by his answer, as far as it is at all necessary to state it, admitted the letters as set forth in the bill to have passed, but insisted, by way of defence, that such letters did not constitute an equitable assignment of the debts due from the railway companies, and further insisted that such letters had relation, not to any general balance which might become due from Gandell & Brunton, but to the specific debt, or sum of about £3000l. due at the dates of the letters, and that that sum had been paid by Gandell & Brunton to the bank, who therefore had no claim in respect of those documents. And it was further insisted, that the sums of money which had come into the hands of Westmacott were not sums of money within the meaning of the undertaking

contained in the letter of 27th December, 1845, and * 770 * therefore were not subject to the appropriation mentioned therein. It was, however, admitted that large payments had been made by Westmacott to Gandell & Brunton, in respect of their demands against the railway companies. The answer further stated that a partnership had existed for several years between Pinniger & Westmacott, but that on the 31st December, 1845, the partnership was dissolved, and Pinniger's name wholly withdrawn, and that he had not for a considerable time previously at all interfered with the business, and denied Pinniger's liability.

The answer of Pinniger disclaimed all personal knowledge of the matters in the bill, referred generally to Westmacott's answer, and denied his liability under the letter written by Westmacott.

Gandell & Brunton having become bankrupts subsequent to the filing of the original bill, Charles Turner, George Long, and Charles Hutchins, the assignees appointed under the bankruptcy, were made defendants by a supplemental bill; and on the part of the assignees it was insisted that the documents did not operate as an equitable assignment, and at all events that they were intended only as a security for the debt due to the bank at the dates of the letters, which debt has since been paid by Gandell & Brunton. And the assignees further insisted, that for want of notice to the railway companies, the documents were not available against the creditors under the bankruptcy.

The correspondence set out in the bill and answers was admitted, and also certain proceedings and accounts relating to the railway companies who were debtors of Gandell & Brunton.

* Some parol evidence was also given by Watson, the * 771 clerk of Gandell & Brunton; by Broughall, the secretary to one of the railway companies; and by Samuel Shuttleworth, a clerk of Pinniger & Westmacott: but according to the view that I have formed of the case, it must be decided upon grounds wholly irrespective of that evidence, and which therefore it is not necessary to detail.

The case was heard before the late Master of the Rolls, who held that the bank had failed to establish that any such equitable assignment had been made, of which the declaration was prayed; and he decreed that the plaintiff's bill be dismissed with costs as against Gandell & Brunton, and without costs as to Pinniger & Westmacott, and also with costs as against the assignees under Gandell & Brunton's bankruptcy. The case comes before this Court by way of appeal against that decree.

Upon the argument of the appeal several points were discussed, and among them, whether the letters referred to were intended to secure such floating balance as might become due from Gandell & Brunton to the bank not exceeding 3000*l.*, or whether they were intended to secure a specific sum then due of about 3000*l.*, and whether that sum had or not been paid; and, further, whether the sums of money which came into the hands of Westmacott, and which were paid by him to Gandell & Brunton, ought to be held as subject to the appropriation of Pinniger & Westmacott's letter of 27th December, 1845; and also whether that letter, in the absence of notice to the railway companies, bound the fund as against the

creditors: and Mr. Pinniger's liability upon the undertaking given by Westmacott was also disputed.

* 772 * It will not be necessary for me to express an opinion upon any of these points, as I think the case may properly be decided upon the main ground of equity made by the bill; that is, whether the letters relied upon constitute a valid equitable assignment of the debts due from the several railway companies mentioned in those letters, according to the law of this Court, as pronounced by Lord ELDON in *Ex parte South*, (a) and by Lord COTTENHAM in *Burn v. Carvalho*. (b)

The law relied upon, on the part of the bank, as stated by Lord ELDON in the case of *Ex parte South*, is to the following effect: "If a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him." The same law is thus pronounced by Lord COTTENHAM, in the case of *Burn v. Carvalho*: "In equity an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund."

Numerous cases were cited during the argument, but they all seem to me to be to the same legal effect, although they vary in circumstances. It will, however, be necessary to advert to those cases, so far as to show that they do not extend the principle beyond what it was enunciated by Lord ELDON and Lord COTTENHAM, in any way bearing upon the case.

The law as stated by those learned Judges was not disputed upon the part of the defendants, who rested their defence upon the ground that the present case does not fall within that law.

* 773 * In *Ex parte South*, (a) the order was given by Jane Row to Alderson, her creditor, directed to the executor of a person indebted to Jane Row and requiring the executor to pay the debt so owing to Jane Row to Alderson, her creditor.

Lett v. Morris (c) was an order by a builder upon his customer and employer, directing such employer to pay the timber merchant the amount due to him for timber supplied for the work, out of the money which should become due to the builder in respect of the work he was doing.

In *Yeates v. Groves*, (d) Dawson sold certain premises to Groves

(a) 3 Swanst. 392.

(c) 4 Sim. 607.

(b) 4 M. & C. 690.

(d) 1 Ves. Jr. 280.

& Dickenson, and he gave to Brown, his creditor, an order upon Groves & Dickenson, requiring them to pay Brown the amount due to him from Dawson, out of the purchase-money due from Groves & Dickenson to Dawson.

Crowfoot v. Gurney (a) was the common case of an order directed to a debtor, and adopted and acted upon by him, directing him to pay the amount due from him to a creditor of the party giving the order.

The other cases cited, which differ somewhat in their circumstances, do not extend the principle of the quoted decision.

The case of *Burn v. Carvalho* (b) is before cited; the facts were very simple: Fortunato gave to Burn, his creditor, an order upon Rego, his agent, who then held * goods or money of * 774 his, Fortunato, in his hands, directing Rego to pay Burn his debt. So far the case was of the most ordinary kind; but although Burn forthwith sent the order out to Rego, yet before it reached Rego at Bahia, Fortunato became bankrupt, and Fortunato's assignees insisted that by reason that notice of the transaction had not reached Rego before the act of bankruptcy by Fortunato, the goods or funds remained in the order and disposition of Fortunato as apparent owner at the time of the act of bankruptcy, and that under the provisions of the bankrupt statutes, the creditors were entitled to the goods free from the lien. Lord COTTENHAM held, that as Burn had sent out the order as soon as practicable, the goods could not be deemed, after the order was sent, to remain with the consent of Burn, who in law had become the true owner, in the order and disposition of Fortunato as apparent owner. That was the only point of difference in the decision at law and by the Chancellor, and which point in no respects bears upon the present case.

The counsel for the bank stated, they mainly relied upon the case of *Row v. Dawson*. (c) The case is not very distinctly reported, and therefore I have inspected the registrar's books, and it appears that the question in that case was, whether Tonson and Cowdery (two persons who had respectively made advances to Gibson), or the assignees of Gibson, were entitled to receive a certain sum of money, then in the hands or under the control of Swinburne, the deputy comptroller of the exchequer; and the

(a) 2 Moo. & Scott, 473. (b) 4 M. & C. 690. (c) 1 Ves. 331.

rights of the parties depended upon the effect of an order given by Gibson before his bankruptcy to Tonson and Cowdery, in

* 775 consideration of present advances made by them. *The

order was in these terms: "Out of the money due to me from Horace Walpole out of the exchequer, and what will be due at Michaelmas, pay to Tonson 400*l.*, and to Cowdery 200*l.*, value received." The order was immediately lodged with the officer of the exchequer, Swinburne, but Gibson became bankrupt before the order was acted upon, and Gibson's assignees filed their bill, praying that the amount in Swinburne's hands might be paid to them, or if Tonson and Cowdery were entitled to priority, the residue might be paid to them. The Lord Chancellor held the document to be an assignment of the fund in the exchequer, of which the only practicable notice was given by service of the order upon the officer of the department, thus reducing the case to the ordinary position of an order upon a debtor or person having funds belonging to the giver of the order, requiring the debtor to pay the debt or fund to the creditor of such giver of the order. The illustrations adopted by the Lord Chancellor manifest that he deemed the case to be of the ordinary description I have mentioned. He says, "Suppose an obligee receives the money on the bond, and writes on the back of it, 'Whereas I have received the principal and interest from such an one, do you the obligor pay the money to him:' this is just that case." If the case of the bond, and the case before the Court, were identical, as the Lord Chancellor states, then the order, in both cases, was in substance directed to the debtor; and this case materially differs in the fact, that the order to Pinniger & Westmacott was not an order upon a debtor, or upon a person by whom the debt assigned would be paid: this is an essential difference in point of fact, and in the legal operation of the instrument. I do not discover that this case extends the principle upon which instruments of the nature

* 776 of that under *consideration have been held to operate as equitable assignments.

Several cases were cited, which do not appear to me to have any material bearing upon the case. Among them was *Ex parte Scudamore*; (a) a power of attorney was given in pursuance of a previous agreement between Shepherd and a creditor; Shepherd

(a) 3 Ves. 85.

granted a power of attorney to William, his former partner, to collect partnership debts, and upon trust to pay the creditor out of Shepherd's share; the money was received by the attorney, and the assignees of Shepherd, who had become bankrupt, disputed the right of the creditor to receive the money from the attorney according to the trust. No question was discussed whether the trust in the power of attorney in favour of the creditor had the effect of assigning the debts to be collected; but the sole point in dispute was, whether the trust in the power of attorney, in favour of the creditor, was a fraudulent preference.

In *Fitzgerald v. Stewart* (a) the question was, whether the defendants ought to be held trustees for the plaintiff of the proceeds of certain West India consignments as security for an annuity, and contains nothing applicable to the present case.

In *Gibson v. Minet*, (b) Gibson gave to Mintern, his creditor, an order upon Minet, his debtor, to hold 400*l.* at the disposal of Mintern, the creditor; and the only point discussed in the case was, whether the order under the circumstances was revocable.

In *Garrard v. Lord Lauderdale* (c) the question was * whether an assignment to A. to collect certain debts and * 777 to pay the proceeds to B., who was no party to the transaction, was an assignment of which B. could entitle himself to the benefit; it was held that he could not.

The decision in the case of *Watson v. The Duke of Wellington* (d) does not appear to me to favour the plaintiff's case. The only point decided was, that the letter given by the Marquis of Hastings to Colonel Doyle did not amount to a direction to pay, but was merely an intimation and suggestion, leaving Colonel Doyle the full exercise of his discretion. So far as the case can be deemed to have any bearing upon the present case, it is rather adverse than favourable to the bank.

Ex parte Smith (e) has really no bearing upon this case. Hartsink accepted bills upon the security of platina, and the question was, if the agreement between the original parties to the bill enured to the benefit of the indorsees of the bills, Hartsink, the acceptor, having become bankrupt, not paying the bills; and it was held that the indorsees were not entitled to enforce the lien.

(a) 2 Sim. 333; 2 Russ. & M. 457.

(d) 1 Russ. & M. 602.

(b) 9 Moore, 31.

(e) 6 Ves. 447.

(c) 3 Sim. 1.

I believe I have adverted to all the cases cited which can be considered as having any bearing upon the present case ; and the extent of the principle to be deduced from them is, that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given

by a debtor to his creditor upon a person owing money or
 * 778 holding * funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund ; in other words, will operate as an equitable assignment of the debts or fund to which the order refers. It therefore becomes necessary to examine whether the letters in question come within the principle referred to.

I think that a decision, that the authority to Pinniger & Westmacott contained in the letter dated 26th December, 1845, to receive the debt due from the railway companies, and to pay what should be received to the bank, operated as an assignment in equity of the railway debts, would be to extend the principle much beyond the warrant of the authorities ; and I also think that the effect of such a decision upon the interest of persons giving orders of the like description might be very injurious, and would be contrary to the intention of the parties to the transaction. If an assignment of the debts had been intended, it would have been quite as easy for Gandell & Brunton to have directed the order to the railway companies as to Pinniger & Westmacott. It rather seems to have been intended that the bank should have no title or interest in the debts until the amount of the debts should have been adjusted, and some definite portion been adjusted and realized.

The letter clearly does not fall within the terms of the principle stated by either Lord ELDON or Lord COTTENHAM, inasmuch as the order was neither upon a debtor of Gandell & Brunton, nor upon any one holding funds of Gandell & Brunton, nor, as regarded Pinniger & Westmacott, was there any subject-matter upon which the order could presently attach. It was a mere authority
 * 779 to receive, which might or might not be acted upon ; * it was not directed to the railway companies, nor to any officer or representative of any of the companies, in any sense to make it available against the companies, who might have paid Gandell & Brunton or any attorney or agent appointed by them,

or have arranged for time to pay or have compromised or compounded at their discretion.

The circumstances in which the projectors of the several companies who were the debtors then stood, rendered it highly inconvenient, if not impracticable, to give an available order upon them. Independently of the dispute which appears to have existed in regard to the amount of the debts claimed, it must be observed that the projects of the railways were abandoned, the companies had not been established, there was no existing body or fund which could be looked to for the payment of the debts, and the only legal means of enforcing payment were by actions against individuals who had proposed to take shares in the companies, or who by their conduct had incurred personal responsibility. To have availably assigned the unliquidated demands upon those subscribers or persons, must have proved, as before stated, if not impracticable, at least most inconvenient and embarrassing.

The document contained no authority to the railway companies to pay the bank, nor any authority to the bank to demand or receive from the companies or the subscribers; and if the conduct of the parties and the attendant circumstances might be considered as aids in construing the letters, or in ascertaining the intention of the parties, that conduct and those circumstances satisfy my mind that Gandell & Brunton never intended to give, and the bank never sought or understood it was to acquire, any interest or right and title to the railway *debts beyond *780 what actually came into the hands of Pinniger & Westmacott.

From the absence of notice of the transaction to the companies, they, as before stated, were left at liberty to pay Gandell & Brunton or their appointee, or to compound or otherwise agree with them at their discretion; and although it is not necessary to the validity of an assignment of a debt as between the assignor and assignee that notice should be given to the party from whom the debt is due, yet it is most usual and very expedient for the safety of the assignee that it should be done, and the omission to give any such notice may operate as strong moral evidence of the intention and understanding of the parties.

In this case the conduct of the parties after the order was given, corresponds with the inference that the bank did not understand that it had acquired any interest in the debts, except so far

as any portion of them should come into the hands of Pinniger & Westmacott. Gandell & Brunton found it necessary, through their own attorney, Mr. Gooday, to commence actions for the recovery of their railway debts, and to refer in some instances to arbitration; and although the bank was aware of such proceedings, yet no communication on behalf of the bank was made either to the defendants in those actions or to Mr. Gooday (Gandell & Brunton's attorney), into whose hands the money upon recovery would come, as to any claim on its part upon the funds to be recovered.

Further, the circumstances of Gandell & Brunton at the date of the letter in question must have rendered an equitable * 781 assignment of the railway debts to the * bank very inconvenient and embarrassing. The only reasonable prospect of a successful result of the claims made by Gandell & Brunton was by negotiation, compromise, and arrangement; and the effect of an assignment of the debts must have tended to produce delay, embarrassment, and expense, and at all events would have required various attendant stipulations and agreements to be inserted in any instrument of assignment, to adapt the arrangement to the necessities of the existing circumstances as to the powers of suing, compromising, &c.

And further, considering the pecuniary situation of Gandell & Brunton at that time, if an assignment had been made to one creditor, the probability would be that other creditors would have peremptorily insisted upon a similar security, and thereby have multiplied the difficulties.

Prudent reasons, therefore, existed why no arrangement should be made which should operate as an assignment, and that the bank should be satisfied with the undertaking of Pinniger & Westmacott to pay to the bank what moneys should come to their hands.

The situation of Pinniger & Westmacott as attorneys of the railway companies, and they having a friendly feeling towards Gandell & Brunton, rendered it highly probable that through their means and influence, arrangements might be accomplished which would facilitate the application of what might be received to the benefit of the bank.

Upon a full consideration of the contents and nature of * 782 the document in question, independently of authority, * I

am of opinion that it was not intended to be, and does not, according to the law applicable to that subject, operate as an equitable assignment of the debts due from the railway companies as alleged by the bill, and that no authority has been cited which will warrant the construction contended for by the bank. The appeal must therefore be dismissed with costs.

* SEAGRAVE v. POPE.

* 783

1851. December 10, 11, 13. 1852. February 26. Before the Lord Chancellor Lord TRURO.

The owner of shares in a benefit building society gave a mortgage security on leaseholds for sums advanced to him by the society in respect of his shares: he subsequently claimed to be entitled to redeem the premises so mortgaged, upon the terms of repaying the amounts advanced to him by the society less the amount of subscriptions which he had paid, and the proportion of profits in the society to which he was entitled; and he instituted a suit for redemption accordingly. *Held*, by the Lord Chancellor dismissing the bill, that he was not entitled to redeem, except upon the terms of paying all sums which according to the rules of the society were then due, or might thereafter become due during the probable duration of the society.¹

THIS was an appeal by Richard Pope, William Forbes, and David Ferguson, the defendants in the suit, against a decree made by the Vice-Chancellor KNIGHT BRUCE on the 8th March, 1850, for the redemption by Thomas Brandon Fleming, one of the plaintiffs, of a mortgage of leasehold premises executed by him to the defendants as trustees of the Camberwell Building and Investment Society, and bearing date the 10th December, 1847. The premises comprised in the mortgage had been sold by T. B. Fleming to the other plaintiff, William Seagrave; and the question raised was on what terms the redemption should take place.

The society was established in 1843 (commencing business on the 6th November of that year), under the provisions of the Act

¹ See *Smith v. Pilkington*, 1 De G., F. & J. 120; *Fleming v. Self*, 3 De G., M. & G. 997; *Archer v. Harrison*, 7 De G., M. & G. 404; *Farmer v. Smith*, 4 H. & N. 196; *Reg. v. Trafford*, 4 El. & Bl. 122; *Sparrow v. Farmer*, 26 Beav. 511.

6 & 7 Will. 4, c. 32, intituled "An Act for the Regulation of Benefit Building Societies;" and the following are such portions of its rules as bore on the question in the cause.

"7. Subscriptions and Mode of Payment. — That every person entering this society on or before the third monthly meeting shall pay the sum of two shillings and sixpence per share as entrance money, and after that period shall pay such sum per share as entrance fee as the directors shall appoint, until the directors

* 784 * shall fix upon a greater amount as a bonus. That every member of this society shall, on the first monthly meeting, commence paying his or her subscription money or sum of eight shillings and sixpence per share for each and every share he or she may hold, and shall afterwards continue to pay his or her subscription money of eight shillings and sixpence per share, with all fines that may be due from him or her, on the day of every succeeding monthly meeting, until the objects of the society have been fully accomplished. . . ."

"9. Mode of advancing Money by Sale of Shares. — That so often as the funds of the society shall amount to a share or sum of one hundred pounds (or by anticipation, that is, before the funds actually amount to that sum, if the directors shall so determine), the share shall be awarded to the highest bidder by premium for the preference (but no member shall be allowed to advance less than five shillings on each bidding), and the purchaser shall have the privilege of taking as many additional shares at the same rate as the directors may award him not exceeding nine, on giving notice of such an intention to the chairman at the time of sale: and the directors shall, if they deem it to the advantage of the society, have the power to sell an additional share or shares, quarter, half, or three-quarter share, at the same rate of premium as the last purchase if required. . . . That such sales shall take place at such time and place as the directors may appoint. . . . That the biddings shall be taken by ticket three times successively, and the person ultimately offering the largest price shall be the purchaser. That whenever a member shall purchase a greater number of shares than he shall have previously subscribed for, the sum of one pound shall be forthwith paid on each share to the secretary as part of the subscription

* 785 money payable thereupon. And all other payments * shall be made pursuant to rule 7, and in default thereof the said

sum of one pound per share shall be forfeited, and the directors shall have power to resell such share or shares."

"11. Interest or Redemption Money.—That any member having received cash for his or her share or shares shall pay the sum of three shillings and sixpence, as and towards the redemption thereof, for each and every share, and in proportion for a fractional part of a share, he or she may hold on the next subscription day after receipt thereof, and shall continue paying the same during the continuance of the society on every succeeding monthly subscription day, with and in addition to the monthly subscriptions; and such member shall be liable to the payment of one-half of the fines for the non-payment of his or her redemption money at the periods above specified."

"12. Security for Money advanced on Shares sold.—That when any member shall have been awarded his or her share or shares, pursuant to article 9, he or she shall forthwith give notice of the situation of the premises intended to be offered for the security thereof to the secretary, who shall forthwith transmit a copy of the same to the surveyor together with the surveyor's fee as mentioned in the fourth rule; and the surveyor shall, within seven days after the receipt thereof, examine the premises mentioned in such notice, and make his report in writing to the directors at the next meeting. That when the directors shall be satisfied that the premises so to be offered as aforesaid are a sufficient security to the society, they shall authorize the trustees to pay to such member the sum or sums of money which he or she shall be entitled to receive, on such member executing a mortgage of such premises as * the solicitor to the society shall require, * 786 and deliver the same and all other necessary title-deeds relating thereto to the solicitor, to be deposited with the trustees as a security to the said society for so much money as shall therein be expressed to be secured, and the trustees shall make such payment accordingly. . . . That in the said mortgage deed it shall be specified that in case the said member shall at any time thereafter fail, neglect, or refuse for six calendar months to pay, observe, and perform all or any of his or her subscriptions, payments, and regulations, on his or her part respectively to be paid, observed, and performed, then the trustees or directors for the time being may appoint a person or persons to collect the rents and profits of the premises therein mentioned: but should the same be insuf-

ficient to satisfy the purpose aforesaid, then the trustees or the directors in their names, may without the concurrence or consent of the said member absolutely sell and dispose of all or any part of the said premises by public auction, but in case no public sale can be effected, then by private contract, for the most money that can be had or gotten for the same, and shall receive the purchase-money arising therefrom; and at such public sale the trustees or directors, or one of them, or some other person to be appointed by him or them in writing, shall be allowed to buy in the premises on behalf of the society and to resell the same without being answerable for any loss that may be occasioned by such resale; and out of the money to arise from such collection of rents and profits or such sale as aforesaid, the directors for the time being shall in the first place discharge all costs, charges, and expenses which may be incurred on account of such collection of rents or sale or sales, or in anywise relating to the trusts therein contained; and in the next place shall retain and reimburse

* 787 themselves and the said society all such subscriptions * and other payments as shall then be due, owing, and payable by such member under and by virtue of these rules and the mortgage deed; and the moneys so retained for the said society shall immediately be placed with the society's bankers to the account of the trustees for the use and benefit of the society; and they shall and will pay the surplus (if any) arising from such sale or collection of rents to the said member, or to such other person or persons as he or she shall, by writing under his or her hand, direct or appoint to receive the same."

"14. Power to sell, exchange, or redeem Property in Mortgage.—That if any member of this society, having purchased any share or shares and secured the repayment thereof upon his or her premises, shall sell such premises, it shall be lawful for the purchaser to take the same chargeable with the debt due to the society, and thenceforth to become answerable to the society for the payments of the subscriptions and other charges as the same shall become payable, on such purchaser signing such agreement as the solicitor to the society may require for paying the subscription money and other payments to be made by him. That if any member shall be desirous of having his or her property discharged from such debt, it shall be lawful for the holder of such share or shares, or so much thereof as shall be then unpaid, to transfer the

same to some other premises of adequate value to be approved of by the surveyor of the society; and upon having such share or shares or so much thereof as shall be then due in respect thereof secured on other premises to the satisfaction of the solicitor, the trustees for the time being shall, at the cost of the member, release and convey the premises for which other premises shall have been substituted, and make such indorsement as hereafter mentioned; * and in the first mentioned event shall * 788 also, but at the cost of such member, release him or her from all future liability in respect of the premises upon the shares purchased from the said society, and secured upon the premises sold as before mentioned. That if any member of this society, who shall have received his or her share or shares, or any portion of them, shall be desirous of paying and satisfying the security or securities which shall have been given for the same, and shall give notice of such his or her desire to the directors, the directors shall within one month thereafter award to such member the same proportion of profits per share as is allowed on the withdrawal of unpurchased shares; and the directors shall make a deduction of such profits, and of the amount of subscriptions paid in by such member, from the full amount expressed to be secured in and by the mortgage; and the directors are hereby authorized and empowered to receive the balance in one payment, or by such instalments as the directors and members shall agree upon; and on the payment of the balance, together with all fines and other sums due in respect of such shares, the directors shall desire the trustees to deliver up all deeds and other documents in their custody relating to the security of the member on such property, and, at his or her cost, to indorse a receipt or acknowledgment on such mortgage according to 6 & 7 Will. 4, c. 32, § 5."

"16. Members withdrawing.—That any person who shall be desirous of withdrawing from this society any share or shares, which shall not have been purchased according to rule 8, shall be allowed to do so on giving one month's notice in writing of his or her intention to the directors at any general meeting of the society, and the money subscribed in respect of such share or shares shall be repaid to such member, subject * only to * 789 the forfeitures next hereafter mentioned; that is to say, if application to withdraw shall be made within the first year from the first meeting thereof, a forfeiture of half a guinea per share; if

within the second year of such meeting, a forfeiture of five shillings and sixpence per share; and if the application to withdraw be made within the third or fourth year from the holding of the said first meeting, he shall take out the net amount of the subscriptions paid in, exclusive of entrance fee; that if the application to withdraw any such share or shares shall be made within the fifth or any subsequent year from the holding of such first meeting, the directors are hereby empowered to allow the member so desirous of withdrawing, out of the profits which the society shall have realized, a bonus for the withdrawal of each share as they shall from time to time appoint. That if more than one member shall give notice to withdraw at one time, they shall be paid in rotation according to the priority of notice. Provided always, that the forfeitures hereby imposed shall not extend to the widows and children of deceased members. That in case of withdrawal of shares from the society, subscriptions in arrear, and all fines incurred previously to any such application, shall be deducted from the amount which the member or members shall be entitled to receive."

"32. Arrears at the Close of the Society. — That when it shall appear by the books of the society that there is sufficient to pay each share of one hundred pounds, then all arrears of subscriptions, redemption fines, and other payments shall be payable immediately; and the trustees shall enforce the payment as before expressed in these rules, and that each member shall be paid his share accordingly."

* 790 "33. Termination of the Society. — That when all * the payments hereinbefore mentioned, that is to say, the sum of one hundred pounds for each share, with all other expenses and liabilities of the society, shall be fully paid and satisfied, then the accounts shall be finally audited, printed, and sent to each member as hereinbefore mentioned, and the society shall terminate; and the trustees shall, with the advice of the solicitor of this society, deliver up to each member, or his legal representatives, the title-deeds and other documents which shall have been deposited with them by such member as a security to the society, and shall and will at his or her request indorse on his or her mortgage a receipt for all the moneys intended to be secured thereby pursuant to 6 & 7 Will. 4, c. 32, § 5. That two-thirds of the majority of the members present at any meeting specially convened for that

purpose, by giving seven days notice to each member, shall have full power to declare this society at an end, and all the accounts thereof shall thereupon be finally closed ; and such resolution shall be effectual at law and equity as a release to all the members."

The mode adopted by the society for advancing and disposing of their money on hand, was as follows. At a public meeting, held pursuant to notice given by handbills and otherwise, the chairman of the society declared that the society was prepared to lend money on mortgage security to the holders or purchasers of shares in the society (or, as the defendants represented it, that the society offered and proposed to sell shares of the society conformably to the rules and regulations thereof) ; and thereupon one share, such share being of the nominal value of one hundred pounds, was put up to competition by ticket, and each person desirous of borrowing returned to the chairman one of such tickets with his name and address written thereon, together with the premium or rate * at which he was willing to take up money by way * 791 of mortgage ; whereupon the chairman inspected the tickets so returned to him, and announced the highest premium offered or bidden, and the same course was again twice gone through, and ultimately the highest bidder was declared by the chairman to be the person entitled to take up or borrow money of the society by way of mortgage ; and such party was then asked by the chairman how many shares he would like to take up money upon at the same premium or rate, and such party answered according to the sum he was desirous of obtaining from the society by way of mortgage, and thereupon in due course the difference between the nominal value of the several shares such party elected to take up or borrow money upon, and the total amount of the sums or premiums he had agreed to give for such shares together with any back subscriptions which according to the rules of the society might be payable by him in respect of such shares, was paid to the party in cash, upon a mortgage security approved of by the society being executed and given by him to the trustees of the society pursuant to the rules.

T. B. Fleming was the original solicitor of the society, and held five shares from the commencement, on which, in March, 1846, he took up money, and executed a mortgage for the same ; but this transaction had no reference to the matter in question in the suit.

On the 2d February, 1846, T. B. Fleming became the owner

by purchase from original holders of three other shares, in respect of which he paid all subscriptions and other payments due to the society. At a public meeting, held on the 1st February, 1847, for the purpose of making advances of money on the shares in the society, he became the purchaser of two additional shares, * 792 and * proposed to borrow money thereon and upon the said three other shares, at the premium or rate of 45*l.* 10*s.* per share; and thereupon the society advanced him 272*l.* 10*s.*, such sum being the difference between the sum of 500*l.*, the nominal value of the five shares, and the sum of 227*l.* 10*s.*, the total amount of the premiums on the said shares: and T. B. Fleming, out of the sum of 272*l.* 10*s.* so advanced to him, paid to the society the back subscriptions on the two additional shares purchased by him at the meeting, and also executed and gave to the trustees of the society a mortgage security, pursuant to the rules of the society, upon certain leasehold messuages and premises.

T. B. Fleming subsequently purchased and became the holder of four more shares in the society; and at a public meeting, held on the 2d August, 1847, for the purpose of making advances of money on shares, he became the purchaser on one additional share, and proposed to borrow money upon this and the four shares at the premium or rate of 45*l.* 10*s.* per share, and thereupon the society advanced him 272*l.* 10*s.*, this sum being made up in the same manner as the former advance already described; and he paid the back subscriptions due on the one share purchased by him at the meeting, and also executed and gave a mortgage upon certain other leasehold messuages and premises, as on the former occasion.

On the 28th October, 1847, T. B. Fleming proposed to the directors of the society to transfer the two mortgage securities given by him in respect of the ten shares to other property belonging to him, pursuant to the fourteenth rule of the society. This proposal was acceded to by the directors: the premises comprised in the two mortgages were discharged from the * 793 moneys * secured thereon, and the deeds relating thereto delivered up to T. B. Fleming; and the following new mortgage security was executed by T. B. Fleming in lieu thereof.

By indenture bearing date the 10th December, 1847, and made between T. B. Fleming of the one part and the defendants of the other part, after reciting the leases intended as a security, and the formation of the society, and after reciting that the sum of money

to be contributed in respect of each share in the funds of the society amounted to 100*l.*, and that T. B. Fleming was entitled to receive out of the funds 1000*l.* in respect of ten shares, as described and numbered in the books of the society, and for the security of all payments to become due in respect of the said shares he had agreed to execute the assurance thereby made: it was witnessed, that T. B. Fleming, in consideration of 544*l.* to him paid by the trustees, assigned to them the leasehold premises in Manor Road therein described, to hold to them, their executors, administrators, or assigns, for the residue of the terms by the leases granted, upon trust from time to time, so long as T. B. Fleming, his executors, administrators, or assigns, should duly make the several payments and observe and perform the regulations prescribed in the articles of the society in respect of the said shares, and also perform all the covenants therein contained to be made, observed, and performed, to permit him or them to hold the said premises and receive the rents thereof for his and their benefit; but if he or they should at any time thereafter fail to perform and keep all or any of the said covenants, or should neglect or refuse for the space of six calendar months to pay, observe, and perform all or any of the subscriptions, payments, or redemption money and regulations on his or their parts to be paid, observed, * and * 794 performed, then upon trust to appoint a person to collect the rents; but should the rents be insufficient to satisfy the purposes aforesaid, then upon trust to sell as therein mentioned, and out of the rents and the money arising from the sale, first, to retain certain costs as therein mentioned, and in the next place to retain all such principal money, subscriptions, or other payments as should have been advanced to or should be due by T. B. Fleming, his executors, administrators, and assigns, in respect of the said shares, it being agreed by the parties thereto, that in case such sale should take place, all moneys which would at any time afterwards become due from him or them, according to the rules of the society, should be considered as then immediately due, and the same or so much thereof as might be lawfully demanded should be deducted out of the moneys received under the aforesaid powers, and to pay the residue of the said moneys unto the said T. B. Fleming, his executors, administrators, or assigns; and it was thereby declared that the deed should not be a security for a greater sum than 544*l.* The indenture contained covenants by T.

B. Fleming to complete the messuage, to pay the subscriptions and interest payable on his shares according to the rules of the society on the days and in manner therein mentioned, and abide by and perform the rules thereof in respect of the said shares; that it should be lawful for the trustees, &c., after default should be made in the several subscriptions, interest or other payments therein-before made payable or in observing the rules of the said society, to enter into the said premises and receive the rents; for further assurance, and to insure from damage by fire.

On the 2d November, 1848, T. B. Fleming sold to W. Seagrave the property comprised in the indenture of mortgage, subject *795 to the underleases, but freed and discharged *from the mortgage security; and on the 4th November, 1848, he gave notice in due form to the society of his intention to redeem the mortgage of the 10th December, 1847.

The formal answer to this notice was given by the following letter from Messrs. Shield & Harwood, the then solicitors of the society, to T. B. Fleming, dated the 18th November, 1848: "Camberwell Building Society. Sir,—The directors of this society have placed in our hands the several letters you have recently addressed to them on the subject of redeeming the security given by you to the society for ten shares, on property in Manor Road. The principle on which the account between a shareholder in a building society and the trustees should be taken has recently been judicially decided in a case before the Vice-Chancellor WIGRAM, *Mosley v. Baker*, reported 17 Law Journal, N. S. 257. The rules in that case are merely identical with those of this society on the subject of redemption, so also was the mortgage deed, with this exception that in your mortgage deed the trustees are authorized to retain out of the proceeds of a sale under the power, not only all the future subscriptions and payments which would become due during the estimated duration of the society, but also the principal money advanced to you on taking up your shares. Assuming, however, that the latter words were inserted by mistake, and taking the account as directed by the rules, and the deed omitting those words, it will stand as appears by the statement we now inclose. The directors, after a careful consideration of the matter, and taking into account the claim advanced by you to credit for a share of profits on redeeming your security, have decided that the probable duration of the society will be eleven years from

its commencement in 1843. We have, therefore, assumed * that term in the inclosed calculation. We understand the * 796 subscriptions on your shares are now in arrear, and that on the next subscription night four months will be due, amounting, with 30s. fine, to 25l. 10s. For the purpose of our calculation, however, we have assumed all the arrears to be paid. We shall be happy to attend to any observations you may have to make on our calculations, and you will be pleased to receive this letter and the inclosed account without prejudice. We remain, &c., Shield & Harwood."

The account inclosed was as follows :—

T. B. Fleming, Esq., in Account with the Camberwell Building Society.

Dr. Stated without prejudice.

1847, December 6. — To subscription at 8s. 6d. per share per month, on ten shares, from 6th November, 1843, when the society was formed, to 6th December, 1847, being the last subscription day before the advance of the ten shares; viz., four years and two months £212 10 0

To subscription and redemption money on ten shares, at 12s. per share per month, from the time of the advance to the 6th November, 1854, calculating the society to terminate in eleven years from the commencement; viz., seven years and ten months 492 0 0

£704 10 0

* Cr.

* 797

1847, December 6. — By subscriptions paid by Mr.

Fleming to the date of the advance £212 10 0

1848, December 4. — By subscriptions paid or due from Mr. Fleming, from the 6th December, 1847, to the 4th December, 1848, being one month after notice to redeem, being one year at 12s. per share per month 72 0 0

By proportion of profit, as per rule 14, at 4l. 5s. 3d.

per share on ten shares 42 12 6

By balance payable on redemption 377 7 6

£704 10 0

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In the account thus sent to T. B. Fleming he was charged with 12s. per month on each of the ten shares, from the time of the advance to him down to the 6th November, 1854, the supposed period for the termination of the society, this sum of 12s. per month per share being made up of 8s. 6d. per month per share charged to T. B. Fleming under the seventh rule as a holder of shares, and of 3s. 6d. per month per share charged to him under the eleventh rule as having anticipated and received cash for his shares. The effect of this was to charge T. B. Fleming with the gross amount of all the subscriptions of 8s. 6d. per month per share which would become due in respect of the ten shares, and also the gross amount of all the interest or redemption moneys which would become payable upon the mortgage during the continuance of the society, in case the mortgage security was not in the mean time redeemed.

T. B. Fleming insisted that he was entitled to redeem, on * 798 paying to the society the sum of 237l. 18s., being * the amount actually advanced to him in respect of the ten shares, less the amount of subscriptions which up to the time of such redemption became payable and which he had actually paid in respect of such shares, and the proportion of profits in the society to which he was entitled on account of such shares.

On the 16th January, 1849, the present suit was instituted, by W. Seagrave and T. B. Fleming as plaintiffs, against R. Pope, W. Forbes, and D. Ferguson as defendants, praying a decree for redemption on the terms thus insisted upon by T. B. Fleming.

The bill charged, and the defendants in substance admitted the fact, that the only instance which had occurred in the society of any member, who had anticipated or received cash for his shares or borrowed money thereon, afterwards redeeming his shares, had occurred about two years previously in the case of one Mr. Mills; and in that instance, after some discussion as to the terms on which he should be allowed to redeem, and after a case on the subject had been laid before Mr. Tidd Pratt and his opinion obtained thereon, the said Mr. Mills was allowed to redeem and he did redeem the premises mortgaged to the society on payment of the sum which the society had actually advanced to him on such security, less the amount of subscriptions he had paid. The bill also charged, and the defendants admitted, that it was altogether uncertain how long the society would continue, and that its continu-

ance for eleven years from the commencement thereof was altogether problematical. The bill further charged as a fact, that it was altogether impossible for any person to calculate, with any measure of certainty, how long the society would last: this allegation was, however, denied by the defendants.

The cause came on to be heard before the Vice-Chancellor * KNIGHT BRUCE in March, 1850, when his Honor held that * 799 T. B. Fleming was entitled to redeem the premises in question on paying the balance due on account of the sum of 544*l.* on the 4th December, 1848, being one month from the date of the notice with interest at 4*l.* per cent from that time; and that the amount of such balance was to be ascertained by debiting T. B. Fleming with the sum of 544*l.*, and with such of the monthly sums of 3*s.* 6*d.* payable in respect of the ten shares as became due between the date of the mortgage and the 4th December, 1848, and had not been paid by T. B. Fleming, and also with all if any fines to which prior to the 4th December, 1848, T. B. Fleming according to the rules of the society became liable in respect of the ten shares; and T. B. Fleming was to be credited with all the monthly sums of 8*s.* 6*d.* which had been paid by him for and on account of the said ten shares, and also with the sum of 42*l.* 12*s.* 6*d.* mentioned in the account as the proportion of profit on the said ten shares.

From the decree made in pursuance of this decision the defendants now appealed to the Lord Chancellor, alleging that T. B. Fleming ought not to have been allowed to redeem, except upon the terms of paying all subscriptions, redemption moneys, and other payments due, owing, and payable, and thereafter to become due, owing, and payable, by him as a member of the society in respect of the said shares, under and by virtue of the mortgage security and the rules of the society during the probable duration of the society; and that it ought to have been referred to the Master to take an account of such subscriptions, redemption moneys, and payments, the Master, in taking such account, being directed to calculate the probable duration of the society according to the rules, and to consider all moneys which having regard to such probable duration might thereafter become * due from T. B. * 800 Fleming, as due at the time of taking such account.

Mr. Bacon and *Mr. Hardy*, for the plaintiffs, and in support of
[617]

the decision of the Vice-Chancellor. — We contend that the mortgage deed was only a security for the money actually advanced. The case of *Mosley v. Baker*, (a) affirmed by Lord COTTENHAM, (b) was relied upon before the Vice-Chancellor; but that case is distinguishable from the present, and the judgment given was not founded on the rules of the society, but on the particular terms of the mortgage deed, which were very different from those of the indenture here.

Mr. J. Russell, Mr. Rolt, and Mr. Terrell, for the defendants, the appealing parties. — The case of *Mosley v. Baker* is clearly in our favour. The obvious intention of the transaction was to advance to the plaintiff the money to which he would be entitled at a future time, the society taking a security for the future payment of the subscription. The object of the society was not to lend money, but to invest savings, one of the modes of investment being by advancing to members and enabling them to take up the society's moneys on their shares by anticipation. The security to be given must therefore necessarily include the payment of the full amount of the shares; and the terms "putting up shares to auction," "purchasing shares," &c., must all be read as including the fulfilling of all the obligations affecting the shares so dealt with. [They referred to *Sampson v. Pattison*. (c)]

Mr. Bacon replied.

* 801 * [THE LORD CHANCELLOR, at the conclusion of the argument, expressed his surprise that the rules of these building societies had not been revised, observing that it would be desirable that this should be done, for the rules were so framed as to give occasion to much difficulty in putting any sensible or consistent construction upon them.]

1852. February 26.

THE LORD CHANCELLOR. — The question in this case, which is somewhat complicated, arises upon the rules of a building society, these rules being to a considerable extent unintelligible and not very consistent with each other. The party on whose behalf the

(a) 6 Hare, 87.

(b) 18 Law J. Ch. 457.

(c) 1 Hare, 533.

question ~~may~~ be considered to have been raised had been the solicitor to the society.

By the rules the subscribers were to pay certain monthly sums for a period so long that the aggregate amount of the subscriptions should allow of each subscriber receiving 100*l.*; but, inasmuch as the monthly payments would amount to a considerable sum long before this period would arrive, power was given to those who managed the concerns of the society, whenever the funds amounted to 100*l.* or to such other sum as they thought a proper one, to put up to auction the sum which they thus had to dispose of. They had power to advance 100*l.* (this being the sum which each individual would be entitled to at the end of the term, when the aggregate subscriptions would furnish sufficient to pay 100*l.* to all the members), putting it up to auction and paying it by anticipation at a discount; that is, every individual might say to the society how much short, or in lieu of the 100*l.* payable at a future period, he would take in present payment.

*The mortgagor, as I may call the bidder for the share * 802 or shares thus put up, undoubtedly gave a very large discount; but it will be observed, that as the subscriber who became the purchaser at the auction was only receiving by anticipation and by discounting that which he would be entitled to receive at a period when he should have made certain payments for the given period, it became necessary, of course, for the society, when the party had anticipated his 100*l.*, to take some security that he would make his future payments. The mode of arrangement seems to have been by allowing the party who discounted his share to give security that he would make the future payments; and there are various stipulations in the rules to that effect, many of them very difficult to understand and to reconcile. I have, however, arrived at a conclusion satisfactory to myself on the subject.

The plaintiff, having assigned certain property to the society upon the occasion of his receiving the sum which he agreed to take by anticipation in lieu of the 100*l.* which he would be entitled to at the period I have mentioned, executed a mortgage of certain property, which is the subject of the present suit. The society says that that mortgage was a security that the mortgagor should continue to make his future payments for the proper period, and which payments he must have made before he could get his 100*l.*

in full, and which he ought equally to make whenever he got that sum which he was content to take instead of the 100*l.*, and which represented the 100*l.* The mortgagor disputes this, and says, that though according to the articles he received a certain sum in respect of his shares, yet that the security which he gave for the money so received was only a security for repayment of that money with interest: he therefore claims to redeem upon payment of that sum.

* 803 * Now the decision of the Court below was in support of that view of his right; but I have arrived at a totally different conclusion. I am satisfied that this security was nothing more than a security to the society that this person should continue to make these payments which he ought to and would have made if the society had gone on upon the simple plan upon which it was founded, nobody receiving any thing until a sufficient amount had been raised by monthly subscriptions to pay each subscriber 100*l.*, and that he is not entitled to redeem upon any such terms as he has claimed.

I repeat that the rules are some of them very ambiguous and difficult to reconcile; but I have reconciled them to a sufficient extent to satisfy me that the conclusion which I have just enunciated is correct.

The judgment, therefore, which I shall hand in to the registrar is a judgment which repels the attempt to redeem, and declares that the party is not entitled to redeem as prayed in his bill. I shall be very happy to give the details of this judgment more at length if or whenever the parties may wish.

Mr. Russell. — Then the result will be that the bill is dismissed with costs.

THE LORD CHANCELLOR. — Yes. (a)

(a) The case was subsequently, on the 15th November, 1852, brought before the then Lord Chancellor, Lord ST. LEONARDS, upon the ground that the dismissal of the plaintiff's bill was not the result intended by Lord TRURO, but that the decree ought to have been for redemption, on terms consistent with the judgment.

His Lordship, however, refused to vary the decree made, observing that there was no pretence for saying that, the plaintiff's case having failed, the dismissal of the bill was such an error or slip as would justify his interference. His Lordship added that if there had been a slip, he would have corrected it, just as Lord TRURO himself would have done.

* Lord TRURO subsequently, and carrying out the intimation above given, delivered to the parties the following judgment:— * 804

In this case, the details of which will be found in the 14th volume of the Jurist, p. 342, the plaintiff Fleming became entitled to certain shares of 100*l.* each in the Camberwell Building and Investment Society. In respect of these shares he received a sum of money from the society, considerably less than the full amount to which he would have been entitled at a future period, and at the same time he executed a mortgage to the society in respect of the money so received. In respect of each of the shares he has paid a monthly subscription of 8*s.* 6*d.*, and a further sum of 3*s.* 6*d.* a month called interest on redemption money, on account of having so received money by anticipation, instead of receiving nothing until the full shares of 100*l.* became due: and the question is, whether the sum so received by him is to be deemed to have been advanced as a loan which he has the liberty of repaying at his option, and by the repayment of which, subject to the reduction of the subscriptions he has paid and to an allowance of profits, he is entitled to redeem the premises mortgaged and to be exempted from all future payments; or whether the sum so received by him is to be deemed to have been advanced by way of anticipatory payment, or substitution of, or equivalent for the full 100*l.* shares which the plaintiff would be entitled to receive at a future time; and whether the mortgage is to be deemed to have been only given to secure the due payment of the subscriptions of 8*s.* 6*d.* and the additional payment of 3*s.* 6*d.* a month.

The plaintiff Fleming, and the plaintiff Seagrave who is a purchaser from him, insisting on the first of these * constructions, filed a bill against the trustees of the society, praying a declaration that the plaintiffs are entitled to redeem the mortgaged premises upon the terms of repaying the amounts advanced by the society, less the amount of subscriptions which the plaintiff Fleming had paid, and the proportion of profits in the society to which Fleming is entitled in respect of such shares; and the Vice-Chancellor KNIGHT BRUCE made a decree containing a declaration in conformity with the prayer of the bill. * 805

From this decree the defendants, insisting on the second of the two constructions which I have mentioned, have appealed, on the

ground that the plaintiff ought not to have been allowed to redeem, except on the terms of paying all subscription and redemption moneys, and other payments due and hereafter to become due in respect of the shares, during the probable duration of the society to be estimated by the Master.

In order to decide the point in dispute, it will be necessary to consider the purpose and object for which the society was established, the Act of Parliament under the authority of which the society was constituted, the articles or regulations of the society, and the mortgage deed.

The society was framed under the authority and to effect the objects of the 6 & 7 Will. 4, c. 32, and the rules are framed in reference to that Act, and also the mortgage; and it may materially assist in arriving at the true construction, as well of the rules as of the mortgage, to consider the statute and the rules and mortgage in connection. Unfortunately each of them is very in-

* 806 accurately framed, with little attention to the consistency of the language in different parts of them, not always using the same words in the same sense, nor considering the applicability and correctness of the expressions in reference to the subject-matter to which they refer.

The general purpose of the Act is the regulation of certain societies, whose object is stated to be, to raise by subscription a fund to assist the members in obtaining small freehold and leasehold property; and with that object it is declared to be lawful for persons to form themselves into societies to raise, by periodical subscriptions, shares not exceeding 150*l.* for the purpose of enabling each member to receive the amount or value of his share or shares therein, to erect or purchase real or leasehold estate, to be secured by way of mortgage, until the amount or value of his share or shares shall have been fully repaid to the society, with interest, and all fines and other payments incurred in respect thereof.

The first remark that arises on the language of the Act is, that the company is stated to be for the purpose of enabling the members to receive the amount or value of their shares to purchase real or leasehold estate, to be secured by way of mortgage to the society until the amount or value of the shares shall be repaid to it, with interest, fines, &c. The immediate antecedent to the words "to be secured" is, "the purchasing real or leasehold estate;" but I think it is plain that the words "to be secured" did not

refer to the real or leasehold estate, but to the amount or value of the shares of the members. But I have great difficulty in ascribing any intelligible meaning to the language as used in this part of the Act, whether it refers to the real and leasehold estates or to the shares; but I think the second section, read in connection with the first, tends to give the meaning of such *first pro- * 807 vision. The second section enacts, that it shall be lawful for the society to receive from its members sums of money, by way of bonus on shares, for the privilege of receiving the same in advance prior to the same being realized, and also interest: and the third section enacts, that a form of mortgage or other instrument may be given, which may be necessary for the carrying the purposes of the society into execution. These three clauses in connection seem to import that the mortgage referred to in the first section is intended to secure the amount or value of the share, which the society is by the second section contemplated to advance to members prior to the same being realized, that is to say, prior to the member, receiving the advance, having made the payments which he was bound to make before he was entitled to the share.

The statute contemplates no loan or advance to the member in any other sense or view than an advance by way of anticipatory payment of the share to which he would be entitled after having made the stipulated payments; and the mortgage is described as intended to secure not a sum in gross by way of general loan, but to secure the amount or value of the shares contemplated to be paid by anticipation; but the expression used is "to be secured until the amount or value of the share shall have been fully repaid," which language does not seem very accurately to express the real intent. The member is to pay by subscriptions an amount equal, with the profit or interest which it may be anticipated would result from the use of his subscriptions, to 100l. or 150l., or whatever may be the amount of the share. It then contemplates that, before the member has paid up the amount of his share, he may, upon allowing a certain bonus or rather discount, receive his share by anticipation, *afterwards * 808 continuing to pay his subscriptions until they shall amount to the sum which entitled him to the share; and these subsequent subscriptions are described in the statute as repaying to the society the amount or value of the shares. If this view of the statute is correct, it may be found material to bear it in mind in considering

the proceedings of the society in question, which evidently are directed to effect the purposes of the Act and in the manner pointed out by its provisions. The first, second, and third sections having relation to the mortgage, it will be observed that the fifth section refers to the same mortgage, and there speaks of it as a mortgage for moneys advanced by the society to the member, and speaks of the person entitled to the equity of redemption.

The seventh article of the society provides for the payment of the subscriptions, and requires that the subscriptions mentioned shall be paid monthly until the objects of the society shall have been fully accomplished. This seventh article is preceded by several articles appointing officers, prescribing their duties, and regulating the elections; but does not, as might have been expected it would, state the object of the society, which is left to be inferred or collected from its title and different articles.

The shares appear by the proceedings of the society to have been 100*l.* shares; but I do not perceive any clause, except the last two, which states the amount of the shares. The thirty-second article provides, that when it shall appear by the books that there is sufficient to pay each share of 100*l.*, then all arrears of subscriptions, fines, &c., shall be payable immediately, and payment shall be enforced; and the thirty-third and

* 809 * last article provides, that when the sum of 100*l.* for each share, with all expenses and liabilities of the society shall be fully paid, the accounts shall be audited, the securities returned to their owners, and the society dissolved, a receipt being indorsed upon the mortgage securities according to the Statute 6 & 7 Will. 4, c. 32, § 5; and it must be particularly observed, that when the 100*l.* per share is raised by the subscriptions, fines, &c., all the mortgages are to be receipted as satisfied, and to be given up; but there is no provision for any payment of money previously advanced in respect of such mortgage. How far this consideration tends to the conclusion, that the mortgage was a security only for the payment of the subscriptions, and not for the repayment of the money advanced except in the shape of subscriptions, I will hereafter consider. The seventh article, therefore, is framed to raise the fund contemplated by the Act of Parliament under the section.

The ninth, eleventh, and twelfth articles seem to be directed to effect the objects of the second and third sections of the statute;

that is, the enabling members to receive the shares in advance prior to the same being realized, upon paying a bonus or rather allowing a discount and interest, with the mortgage necessary to carry the purposes of the society into execution, those purposes being confined to the raising by subscriptions an amount sufficient to pay 100*l.* on each share subscribed for, and to enable members, upon payment or allowance of a bonus or discount and interest, to receive their shares in advance prior to the same being realized; and it is to be considered whether, when the articles use the expression of "a sale of the shares," any thing more is meant than that which is enacted in the second section, that it shall be lawful for members to receive their * shares * 810 by anticipation, and to pay the bonus or interest for such privilege.

The title of the ninth article is, "Mode of advancing Money by Sale of Shares;" a form of expression not very accurate, although by the context sufficiently intelligible. A sum of one hundred pounds was payable when the subscriptions, fines, &c., would enable that amount to be paid upon every share, and in effect the company propose to sell the right of presently receiving the share upon being allowed a certain deduction from the amount, which has inaccurately been denominated a bonus, and is called a payment, it being in fact a deduction made at the time, and which only becomes a payment by the continuance of the subscriptions until the requisite amount should be raised to pay each undiscounted share in full; and the title shows that by advance was meant a payment of a share in advance and not an advance in any other sense, and a sale of a share or payment of a share by anticipation does not seem to be consistent with a repayment of the advance, although it may be consistent with the purchaser making the payments necessary to entitle him to a share at all. The putting a party in possession presently of that to which he would become entitled at a future time upon the performance of certain conditions or payments, furnishes no reason why he should not perform those conditions.

The title of the article being what I have stated, it remains to be seen whether the substance of the article corresponds with the title, and refers to a transaction intended only to put the buyer in possession of the share to which upon the performance of certain conditions he would be entitled at a future period, or

whether it referred to a loan of the amount advanced in
 * 811 * any sense. The ninth article provides, that as often as the fund shall amount to a share of 100*l.*, the share shall be awarded to the highest bidder by premium for the preference. Thus far the transaction is simply awarding a share presently for a premium ; and the meaning which attaches to this article will be most material in construing the other articles. The remaining part of the ninth article refers to the mode of selling, bidding, regulating the premium, and other matters not material to the construction of that part of the section which is under consideration.

The eleventh article evidently relates to the transaction contemplated by the ninth article : the title is " Interest or Redemption Money ;" and it provides in substance that any member having received cash for his share shall, as and towards the redemption thereof, pay, in addition to the monthly subscriptions, 3*s.* 6*d.* during the continuance of the society, upon every monthly subscription day.

There is no previous article referring to a member receiving cash for his share except the ninth, to which alone therefore the eleventh article can refer ; and whatever sense or meaning the words " as and towards the redemption thereof " may be susceptible of, it must have a meaning consistent with a member having purchased a share and received cash for such share ; and the stipulation that the 3*s.* 6*d.* per month is to continue to be paid during the continuance of the society, is consistent with those words, meaning that the party is to pay 3*s.* 6*d.* per month in addition to the ordinary subscription as a consideration, not for a loan or advance of money to be returned, but for a payment made earlier than the party would of right be entitled to receive

* 812 it. And this article * seems evidently an execution of the second section of the statute, which authorizes a bonus or interest to be taken for the privilege of receiving a share in advance without being deemed usury.

The title of the ninth article being " Mode of advancing Money by Sale of Shares," and the tenth and eleventh articles being directed to the same objects, the title of the twelfth article is " Security for Money advanced on Shares sold," a title which seems distinctly to connect the section with the ninth ; and indeed it does so in terms, as it provides that when any member shall

have been awarded a share pursuant to article 9, he shall give notice of the premises offered for the security thereof. It will be observed that there is the same uncertainty or inaccuracy of expression in this article as in the Act of Parliament, when it speaks of security offered for the share awarded. As the security relates to a share awarded, that is, sold, and is to be given after the share has been received, the seller wants no security for the thing he sells, nor the buyer for what he receives; but the seller may require a security for the price, and a price for a share sold is the contract to pay the subscriptions until a fund shall be raised competent to pay every member his share of 100*l.*, and it is security for the performance of that contract that seems to be described here as security for the share.

The second paragraph of the twelfth article authorizes the trustees not to lend, but to pay to the member the sum of money which he shall be entitled to receive on his executing a mortgage as security for so much money as shall therein be expressed to be secured. The language of this part of the article may also be open to remark, but will receive some light from the commencement * of the next paragraph of the article, which * 813 speaks of the member "so entitled" to his share; which would seem to refer to members to whom a share had been awarded under the ninth article, none of the articles entitling a member to a share in any other manner until the society should terminate.

A subsequent paragraph of the same article speaks of a member having purchased a share for the purpose of building, and a surveyor is to certify how much of the share purchased may from time to time be advanced with reference to the state of the building. Another paragraph of the same article provides for the case of a trustee becoming a purchaser of a share, and also provides for a member, after receiving a portion of his share, leaving the security building unfinished.

The parts of the articles to which I have hitherto referred seem to refer unequivocally to the transaction of a member receiving his share by anticipation, and not to a loan. There is, however, in one of the paragraphs, the expression that no second mortgage shall be deemed a sufficient security for any moneys to be advanced by the society, an expression certainly not applicable to the char-

acter which the defendants ascribe to the transaction : but considering the Act of Parliament and the articles in connection, and that there is an entire absence of any provision for advance except in the way of the payment of a share by anticipation, however inapt the expression may be, it is difficult to suppose that it refers to any other transaction than one to which the general substance of the clause is directed, that is, an advance in the sense of payment by anticipation ; and that by a security for the advance

* 814 was intended a security for the * performance of the contract in relation to which the payment by advance was made, that is, the contract to pay the future subscriptions.

The same twelfth article then specifies what the mortgage deed shall contain, and construing that part of the article in connection with the transaction to which it refers, it would be difficult to point out any part which points to a repayment of the sum paid in advance of the share bought.

It is also by the same article provided that the mortgage shall specify, that if the member (*i.e.*, mortgagor) shall neglect for six months to pay his subscriptions and payments, and to observe the regulations of the society, the company may enter the mortgaged premises, collect the rents, or in their discretion sell, and out of the proceeds pay all expenses incurred in collecting the rent and making sale, or in any wise relating to the trusts, and, in the next place, shall retain all subscriptions and payments then due and payable by the member by virtue of the rules and the mortgage deed, and shall pay the surplus, if any, to the member.

It will be observed, that the only sums which the society are authorized to retain out of the rents or proceeds of the sale, are subscriptions and payments due and payable by virtue of the rules and the mortgage deed. Now by the rules no payments whatever are required, but payments by way of subscription and fine : there is no provision whatever which points to the repayment of the money paid to a member in anticipation of a share purchased by him : what moneys are made payable by the mortgage deed will presently be seen.

* 815 * So far as I have adverted to the articles, it is difficult to discover sufficient ground for the argument that the mortgage was to be a security for the repayment of the advance of the share. There are, however, other clauses which remain to be

considered, and upon which the plaintiff relies in support of his claim to redeem on payment of the sum so advanced; and those clauses are the fourteenth and sixteenth articles.

I will first notice the sixteenth. By this, a person who has not had any advance made to him may withdraw from the society and receive back his subscriptions, subject to a certain forfeiture; but this does not afford any good reason for contending that a person who has had an advance may withdraw on payment of such advance. The party to whom a liberty of withdrawal is given by the sixteenth article has not received any thing from the society, but the society has had the use of his subscriptions; but the member who, by the advance made to him, has had his share discounted as it were, is under an obligation to pay and make the monthly payments for which that share was awarded to him.

The first part of the fourteenth article, which gives a power to sell, commences with these words: "That if any member of this society having purchased any share or shares, and secured the repayment thereof. . . ." At first sight this might seem to show that the mortgage was intended to secure the repayment of the sum advanced by the society; but this is only an additional instance of the inaccuracy upon which I have already remarked when commenting upon the twelfth article: the words "secured the repayment thereof" mean secured the payment of the value or price in the shape of the monthly payments, which indeed virtually amount to a securing the repayment of the sum advanced, but something *more, as the monthly payments *816 will be sure to cover and exceed the amount advanced.

The part of the fourteenth article which gives the power of redemption is in these words: "That if any member of this society who shall have received his or her share or shares, or any portion of them, shall be desirous of paying and satisfying the security or securities which shall have been given for the same, and shall give notice of such his or her desire to the directors, the directors shall within one month thereafter award to such member the same proportion of profits per share as is allowed on the withdrawal of unpurchased shares, and the directors shall make a deduction of such profits and of the amount of subscriptions paid in by such member from the full amount expressed to be secured in and by the mortgage;" and the directors are thereby authorized and empowered to receive the balance in one payment, or by such instal-

ments as the directors and member shall agree upon ; “ and on the payment of the balance, together with all fines and other sums due in respect of such shares, the directors shall desire the trustees to deliver up all deeds and other documents in their custody relating to the security of the member on such property, and at his or her cost to indorse a receipt or acknowledgment on such mortgage, according to 6 & 7 Will. 4, c. 32, § 5.”

Upon the words “ security which shall have been given for the same,” I need only advert to the remarks I have just made on the first part of this article ; and as to the words “ the full amount expressed to be secured in and by the mortgage,” the meaning of those words must of course be ascertained by a reference to the mortgage.

And this brings us to consider the terms of the mortgage

* 817 * deed, so far as they are material to be noticed. Now it is only necessary to glance at this deed, and we shall at once perceive that the amount thereby purported to be secured is not the amount advanced by the society, but the several payments to be made by the members in respect of the shares ; for the deed expressly recites that “ for the security of all payments to become due in respect of the shares he has agreed to execute the assurance hereby made.” And the *habendum* is upon trust from time to time so long as Fleming should make the payments, and observe and perform the regulations and articles relating to the said shares, and perform the covenants therein, to permit him to hold the premises and receive the rents ; but if he should fail to perform the covenants, or for the space of six months to pay the subscriptions, payments, or redemption money, then upon trust to appoint a person to receive the rents ; but if the rents should be insufficient to satisfy the purposes aforesaid, then upon trust to sell, and out of the moneys to retain the costs and all such principal money, subscriptions, and other payments as shall have been advanced to or shall be due by the said T. B. Fleming, his executors, &c., in respect of the said shares ; and there is no covenant to pay the sum advanced. The mortgage deed contains no condition or stipulation that the money advanced shall ever be repaid ; and although there is a power to retain it in case of default in observing the covenants and regulations, or making the payments required, that, as we have already seen, is not authorized by the twelfth article, which specifies what the mortgage deed shall con-

tain. But admitting such a power to be only reasonable and necessary for the protection of the society, and supposing it to be valid though not authorized by the articles, yet the mere fact that the society is entitled so to recover the money advanced * where owing to the default of the member it cannot get * 818 the future monthly payments, is no reason why the member should be allowed to redeem on payment of the money advanced to him.

On the whole, I have no doubt that the construction for which the defendants contend is a right one; and although the case of *Mosley v. Baker*, (a) in which the decision of the Vice-Chancellor WIGRAM was affirmed by Lord COTTENHAM, (b) is certainly distinguishable in some respects from the present, yet it was clearly in favour of the society, and I still think that case furnishes an authority in a great degree in support of the construction maintained by the defendants. The documents in the present case are very similar to those in that case, so far as relates to the point in dispute, and they appear to me to require the same construction.

The decision of the Vice-Chancellor must therefore be reversed, and I think that the bill ought to be dismissed.

(a) 6 Hare, 87.

(b) 18 Law Ch. J. 457.



AN INDEX
TO
THE PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

ACQUIESCENCE.

A railway company gave the usual notice to a tenant for life of settled estates that they required a portion of the estates for their line, and afterwards made an offer for the fee-simple. The solicitor of the tenant for life accepted the offer, stipulating that interest at 5*l.* per cent should be paid from the time of the company taking possession, and proposing that, as the title was well known, the company should be satisfied without the production of the deeds. To this the company objected, and proposed to pay the money into a banker's in the names of the respective solicitors pending the investigation of the title. The tenant for life's solicitor thereupon suggested that, as the money must be paid into Court, it had better be so at once. The company thereupon paid the money into Court to the account of the Railway Act only, and communicated to the tenant for life's solicitor that they had paid the money into Court under the 69th section of the Lands Clauses Consolidation Act. The solicitor for the tenant for life thereupon reminded them that interest at 5*l.* per cent would continue to be payable till the purchase was completed. To this the company's solicitor returned no answer, and, although several other communications passed between the solicitors respecting the purchase, the company's solicitor did not, till a year afterwards, express any objection to the payment of interest. The money remained uninvested during the whole of that period. *Held*, that the company had acquiesced * in the vendor's view of the case, and were bound to * 820 pay interest up to the investment. — *Ex parte The Earl of Hardwicke*, 297.

See BILL OF REVIEW. CONTRIBUTORY, 3. INJUNCTION, 2, 3.

ACTION. See REPUTED OWNERSHIP.

ACT OF BANKRUPTCY. See ARRANGING DEBTOR. PARTICULARS OF DEMAND.

ACT OF PARLIAMENT. See PUBLIC COMPANY.

ACKNOWLEDGMENT. See LIMITATIONS.

ADJOURNMENT. See ADJUDICATION, 2.

ADJUDICATION.

1. Where a bankrupt does not contest the validity of an adjudication of his bankruptcy before a commissioner within the period prescribed by the 104th section of the Act 12 & 13 Vict. c. 106, for showing cause against such adjudication, the commissioner has, after that period, no authority to entertain an application to review the adjudication, either under that section, or under the 233d section. — *Ex parte Carter*, 212.
2. In the phrase "such extended time not exceeding fourteen days in the whole," in the 104th section of the Bankrupt Law Consolidation Act, the words "such extended time" mean "such further time," and the time is to be reckoned exclusively of the original seven days.

The provisions of the section do not preclude the commissioner from adjourning the hearing on showing cause, when it has commenced within the proper time. — *Ex parte Castelli*, 487.

See ANNULING, 1. BANKRUPTCY.

ADMINISTRATION.

1. Where a person had at his death, and when letters of administration were granted, *bona notabilia* in one diocese only, the subsequent payment of a portion of them into the Court of Chancery does not render a prerogative probate necessary to obtain payment out of Court.

Where therefore an intestate was, at his death, entitled to legacies under two wills which had been proved in the Consistory Court of Chester, in which diocese the executors and trustees of both wills were also living at the death of the intestate, and letters of administration to the intestate, who died abroad, were granted by the same Court, and afterwards the trustees of one of the wills paid the money into the Court of Chancery under the Trustees Relief Act, it was held that the diocesan letters of administration were sufficient to authorize the administrator to receive the money out of Court. — *Re Knowles*, 60.

* 821

2. The personal estate of an intestate consisted of a reversionary share in the proceeds of trust property, which at her death was unsold, and situate within the jurisdiction of an Archdeaconry Court. Administration was not taken out to her till after the reversion had fallen into possession; the trust property had been sold, and the intestate's share had been paid into the Court of Chancery under the Trustees Relief Act. Letters of administration were then granted by the Archdeaconry Court. Held, that they were sufficient to entitle the administrator to payment of the share out of Court, and that a prerogative administration was not requisite. — *Re Spencer*, 311.

AGENT. See CONSIGNEE.

AGREEMENT. See CHAMPERTY. FRAUD. INJUNCTION, 1. RAILWAY COMPANY. SPECIFIC PERFORMANCE, 1, 2, 3, 4, 5.

ALLOTTEE. See CONTRIBUTORY, 1.

ANNULING.

1. Under the new Bankrupt Act, as under the former law, it is not sufficient ground for annulling an adjudication that its legal validity may be subject to doubt. — *Ex parte Bower*, 468.

2. A petition to annul an adjudication may be presented by a creditor to the commissioner, and it is sufficient if he appeal from the commissioner's decision upon it, within twenty-one days, although much more time may have elapsed since the adjudication.

The circumstance that an order to annul will leave unimpeached an assignment of all the bankrupt's effects to the creditor applying for the annulling order is not sufficient ground for refusing to annul an adjudication unsupported by the legal requisites. — *Ex parte Bean*, 486.

See ADJUDICATION, 1. PARTICULARS OF DEMAND.

ANSWER. See LIMITATIONS. PRODUCTION.

APPEAL.

1. On an appeal from part of a decree the whole case is open to the respondents. — *Watts v. Symes*, 240.
2. Where the Court below has by decree given substantial relief against a defendant, with costs against him personally, it is competent to the Court of Appeal * affirming the decree as to the relief, to vary it * 822 as to the costs; but to render this course correct, there ought to be a judicial dissent as to the costs, strong, clear, and undoubting. — *Reynell v. Sprye*, 660.
3. The time of the commissioner signing and delivering out an order, and not the time of his pronouncing it, is its true date with reference to an appeal. — *Ex parte Heslop*, 477.
4. Where the Court concurred in opinion upon the effect of the evidence as it stood, and only differed upon the question whether the appellant should have an opportunity of proceeding at law, held that the appeal ought to be dismissed with costs. — *Re Clarke*, 48.

See ANNULING, 2. ASSIGNEES. CERTIFICATE, 3. COSTS, 1, 2.

APPOINTMENT. See TRUSTEE, 4.

ARBITRATION. See INJUNCTION, 2.

ARRANGING DEBTOR.

An order under the arrangement clauses of the Bankrupt Law Consolidation Act, granting protection till a day certain, and not till further order, is irregular; and where a trader has obtained an order *ex parte* in that form, it affords no protection against a summons under the 78th section of the Act. — *Ex parte Bowers*, 460.

ASSETS. See MARSHALLING.

ASSIGNEES.

The removal of assignees is a matter within the discretion of the commissioner, with which the Appellate Court will not interfere merely because it doubts whether it would have acted as the commissioner has done. Therefore, where the commissioner gave the assignees time to consider whether they would remove solicitors whom they had appointed, and who were related to the bankrupt, or would themselves retire, and the assignees declined to do either, and the commissioner removed the assignees, the Court dismissed, with costs, an appeal from the commissioner's decision. — *Ex parte Bates*, 452.

See REPUTED OWNERSHIP.

ASSIGNMENT.

An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money, or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will operate * as an equitable assignment of such debt or funds.

* 823

A railway company was indebted to A., their engineer, who was greatly indebted to his banker. The latter having pressed for payment or security, A., by letter to the solicitors of the company, authorized them to receive the money due to him from the railway company, and requested them to pay it to the banker. The solicitors, by letter, promised the banker to pay him such money on receiving it. *Held*, that this did not amount to an equitable assignment of the debt. — *Rodick v. Gandell*, 753.

See ANNULING, 2.

ATTENDANCE. See WINDING-UP ACTS.

ATTORNEY. See TAXATION, 2.

BANKER. See FRIENDLY SOCIETY.

BANKRUPTCY.

A creditor is not entitled to inspect the proceedings for the purpose of enabling him to impeach the validity of the adjudication. — *Ex parte Rimell*, 491.

See ADJUDICATION, 1, 2. ANNULING, 1. APPEAL, 3. ARRANGING DEBTOR. ASSIGNEES. CERTIFICATE, 1, 2, 3, 4. COMMISSIONER. FRAUDULENT DEED, 2. FRIENDLY SOCIETY. PARTICULARS OF DEMAND. PROTECTION. REPUTED OWNERSHIP.

BIDDING. See WINDING-UP ACTS.

BILL. See PLEADING, 1, 2.

BILL OF REVIEW.

The plaintiff, in a cross suit, in which, as well as in the original suit, a decree had been made against him, with costs, moved for a further production of documents, which had been, as he alleged, withheld from him by reason of untrue statements in the answer, and for leave to file a supplemental bill in the nature of a bill of review. The motion, as regarded the documents, was refused, with costs; but, by consent, leave was given to file a supplemental bill, on the plaintiff depositing 50*l*. The supplemental bill was filed, and, pending the hearing of the appeal in the original suit, the defendants moved that all proceedings against them for want of answer in it might be stayed till after the plaintiff had paid the costs of the motion (for non-payment of which he was in contempt), or otherwise that the time for answering might be enlarged.

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* The time was enlarged for four weeks, without prejudice to an application to stay proceedings. After the original decree had been affirmed, with costs, the defendants moved that all proceedings in the

supplemental suit might be stayed until after the plaintiff should have paid the costs of the first-mentioned motion, and also of the original and cross suits (for non-payment of which last-mentioned costs he was also in contempt): *Held*, that the motion was properly refused as regarded the latter costs, on the ground of acquiescence; but that, as regarded the former, the order ought to have been made. — *Sprye v. Reynell*, 702.

BREACH OF TRUST. See TRUSTEE, 2, 3.

BUILDING SOCIETY.

The owner of shares in a benefit building society gave a mortgage security on leaseholds for sums advanced to him by the society in respect of his shares. He subsequently claimed to be enabled to redeem the premises so mortgaged, upon the terms of repaying the amounts advanced to him by the society less the amount of subscriptions which he had paid, and the proportion of profits in the society to which he was entitled, and he instituted a suit for redemption accordingly.

Held, by the Lord Chancellor dismissing the bill, that he was not entitled to redeem, except upon the terms of paying all sums which, according to the rules of the society, were then due, or might thereafter become due, during the probable duration of the society. — *Seagrave v. Pope*, 773.

CALL.

1. By the subscription contract of a provisionally registered railway company, giving the usual powers to the committee of management, the persons who were parties to the agreement of the third part, covenanted, that, in the event of the application to Parliament being unsuccessful, they would pay and discharge all the costs and expenses which should have been incurred with a view to the formation of the undertaking, and all other costs and charges of every description of and incidental to the undertaking, such costs and charges to be assessed ratably on the sums subscribed by them respectively. On winding up the company under the Winding-up Acts, it was alleged on behalf of some of the contributories, that the managing committee had received, by means of the deposits, much more than sufficient for the payment of all necessary costs, * charges, and expenses of every description, and * 825 had misapplied considerable sums. Proceedings were commenced before the Master to enforce payment from the members of the committee of the amount due from them; but it appeared from the affidavit of the official manager that it was not reasonably probable that any considerable sum would be realized by these proceedings. While they were in the course of prosecution, a call was made on the contributories who had executed the deed, ratably, to provide a fund for payment of the costs incurred by the official manager in the prosecution of a suit, and the defence of an action (both of which were undertaken with the sanction of the Master), and generally in winding up the company. *Held*, that the call had been properly made. — *Gay's Case*, 847.

2. Where the Master has made an estimate, so far as is practicable, of the total amount for which, under the Winding-up Acts, the contributories are liable, he may properly make a call for that amount, and the costs of winding up, although the costs have not been taxed, and the exact amount of liabilities is not ascertained, and may make the call for such sum as he may consider likely to realize the sum required. — *Dale's Case*, 518.

CERTIFICATE.

1. Railway stock is within the 201st section of the Bankrupt Law Consolidation Act, which provides that no bankrupt shall be entitled to a certificate who has, within the period mentioned in the Act, lost 200*l.* by any contract for the purchase or sale of any government or other stock. — *Ex parte Matheson*, 448.
2. A proceeding to review the decision of a commissioner who has refused a certificate under the 39th section of the Act 5 & 6 Vict. c. 122, is not a proceeding for the continuance of which provision is made by the 4th section of the Act 12 & 13 Vict. c. 106, and such proceeding cannot be instituted except on one of the grounds specified in the 207th section of the latter statute. The expression in the 4th section, that nothing in the Act is "to lessen or affect any right, title," &c., of a person by virtue of proceedings under then existing bankruptcies, has reference only to the continuance and completion of proceedings affecting the administration of a bankrupt's estate. In 1847 the commissioner refused the allowance of a bankrupt's certificate under the 39th section of the Act 5 & 6 Vict. c. 122; in 1851, after the death of the commissioner, the bankrupt applied to his successor with the view of having the matter reheard, alleging that the statement of the opposing creditor on the occasion of the refusal was partial and imperfect: *Held*, that the application * could only be made under the provisions of the 207th section of the Act 12 & 13 Vict. c. 106; and that, inasmuch as the refusal of the certificate was not obtained by false evidence or improper suppression of evidence or by fraud, the original decision could not be reviewed. — *Ex parte Higginson*, 204.

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3. A creditor who has not been permitted to oppose the certificate before the commissioner, on the ground of his having omitted to give the requisite notice of his intention to oppose, cannot be heard in support of the commissioner's decision, refusing the certificate and protection, on an appeal from that decision. The bankrupt's certificate will be altogether refused if it appear that he has systematically bought on credit to sell at less than cost price. — *Ex parte Holthouse*, 237.
4. *Semble*, that after the commissioner has absolutely refused a bankrupt's certificate, it cannot be referred back to him to review his decision. — *Ex parte Whitaker*, 459.

CERTIFICATE FOR JUDGMENT. See **PROTECTION.**

CESTUI QUE TRUST. See **TRUSTEE**, 3.

CHAMPERTY.

Where A., having a right which was supposed to be of uncertain extent,

likely to be resisted or questioned, and not susceptible immediately or easily of proof, and B. undertook the ascertainment and establishment of this right, on the terms of the expenditure for the purpose being his, and of his having half the benefit of what should be so obtained: *Held*, that such an agreement (whether it amounted strictly in point of law to champerty or maintenance so as to constitute a punishable offence or not) must be considered against the policy of the law, mischievous, and such as a Court of Equity ought to discourage and relieve against. — *Reynell v. Sprye*, 660.

CHARGE. See ASSIGNMENT.

CHARITY.

A testator devised and bequeathed residuary estate, consisting partly of real estates in New South Wales, to trustees upon trust to apply the same at their absolute and uncontrollable discretion, for the benefit and advancement and propagation of education and learning in any part of the world, so far as circumstances would permit: *Held*, a valid charitable bequest. — *Whicker v. Hume*, 506.

See SCOTCH KIRK.

CLIENT. See TAXATION, 1.

* **COMMISSION.** See LUNACY, 1,

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COMMISSIONER.

The annuity awarded to a country commissioner of bankrupts under the 58th section of the Act 5 & 6 Vict. c. 122, passes to his assignees on his insolvency, and does not fall within the cases of exception mentioned in the 56th section of the Act for the Relief of Insolvent Debtors, 1 & 2 Vict. c. 110.

Mode of proceeding to enable the assignee in insolvency to receive such an annuity when the insolvent refuses to make the requisite affidavit that he does not hold any office of emolument. — *Spooner v. Payne*, 383.

See ADJUDICATION, 1, 2. APPEAL, 3. ASSIGNEES. CERTIFICATE, 4.

COMMITTEE. See LUNACY, 4.

COMMITTEE-MAN. See CONTRIBUTORY, 1.

COMPANY. See CONTRIBUTORY. WINDING-UP ACTS.

COMPENSATION. See COMMISSIONER. INJUNCTION, 2.

COMPOSITION. See TITHES.

COMPOSITION DEED. See ANNULING, 2.

CONSIDERATION. See FRAUDULENT DEED, 2.

CONSIGNEE.

In a case where A. had agreed to remit certain consignments to B., and B. had agreed to account with A. for the proceeds of such consignments: *Held*, that it was not competent at any time afterwards for B. to assert a paramount title to the proceeds of such consignments. — *Zulueta v. Vinent*, 315.

CONTINGENT INTEREST. See WILL, 1.

CONTRIBUTORY.

1. A. B. and C. D. were members of the managing committee of a provisionally registered railway company, and as such had allotted to them

and accepted one hundred shares in the company: at a meeting of the managing committee, an instruction was given for the allotment of shares according to a scheme by which five hundred shares were reserved to each member of the managing committee: a report was made by the secretary of the company at * a subsequent meeting at which A. B. and C. D. were both present that shares had been allotted according to the scheme; but no farther evidence appeared of allotment of shares to, or acceptance of shares by the members of the committee: A. B. and C. D. subsequently executed the parliamentary contract in respect of one hundred shares only: *Held*, on the winding up of the company, that the liability of A. B. and C. D. as contributors was limited to the one hundred shares, and was not affected by the proposed reservation of the five hundred shares. — *Sharp and James's Case*, 565.

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2. By the deed of settlement of a company its directors had the power of purchasing on behalf of the company shares in the capital of the company when there should be a surplus fund of 10,000*l.*, and there was no prohibitory clause in the deed restricting the purchase under other circumstances. The deed provided the mode by which a shareholder parting with his shares was to be relieved from subsequent responsibility. The deed also contained clauses regulating the mode of convening extraordinary and general meetings, and provided that, where an extraordinary meeting was to be convened, notice should be given of the specific object of the meeting to each shareholder. The company being in insolvent circumstances, an extraordinary meeting was held and a resolution passed, the purport of which had not been previously notified, authorizing the directors to purchase, within three months, the shares of any member who was desirous of retiring from the company, who would lend to the company a sum equal to the purchase-money. After the expiration of the three months, a general meeting of the company was held, at which the directors were authorized to allow such further time as they might think reasonable to those shareholders who had not complied with the resolution of the extraordinary meeting, and the forfeiture of the shares of those proprietors who should continue to be defaulters was sanctioned. Acting on the resolution of the general meeting, W. L. sold his shares to one of the directors on behalf of the company, and lent a sum equivalent to the purchase-money, receiving the loan note of the company. Having died before the transfer of the shares was effected with all the formalities prescribed by the deed, the company, at the instance of his executor, completed the transfer by the execution of those formalities: *Held*, first, that the resolution of the extraordinary general meeting, being invalid, was incapable of being ratified by the general meeting, whose powers were limited to acts not contrary to the deed; and, secondly, that the resolution of the general meeting, * in terms applying only to defaulters, could not be construed to extend to the privilege of retiring from the partnership, which had expired by

lapse of time; and, thirdly, that the Master, acting under an order for winding up the company, had rightly included the executor in the list of contributories without qualification. — *Lawes's Case*, 421.

3. In deciding whether a party is or is not a contributory within the meaning of the Joint-stock Companies Winding-up Acts, the point to be ascertained is, whether he is liable in any manner whatsoever to contribute to the debts, liabilities, and losses of the company, and it is not necessary that he should be a member of the company according to the strict provisions of the deed of settlement.

If directors, not following the formalities prescribed by the deed of settlement, adopt in respect of a particular transaction, and for the purpose of constituting shareholders, a new rule of proceeding, and a party treats himself and is treated by the directors as a shareholder by virtue of such a transaction, it is not competent either to the party or the directors subsequently to repudiate the transaction on the ground of the non-compliance with the formalities required by the deed of settlement.

- A. B. became the owner of shares in a joint-stock company by transfer from former holders, and treated himself and was treated by the directors as a shareholder: all the formalities of the deed of settlement were not, however, observed in the transaction: *Held*, nevertheless, that every matter of substance having been complied with, the executors of A. B. were properly placed on the list of contributories in respect of the shares, on the winding up of the company. — *Straffon's Executors' Case*, 576.

4. A shareholder in a joint-stock company who had sold his shares, *held*, under the terms of the deed of settlement of the company, not to be a contributory in respect of liabilities of the company incurred previously to the sale of the shares. — *Croxton's Case*, 600.

See CALL, 1. COSTS, 2. WINDING-UP ACTS.

CORPORATION. See SPECIFIC PERFORMANCE, 3.

COSTS.

1. When the Appellate Court agrees with the main relief granted by the Court below, it requires a very strong case to induce it to depart from the decision as to costs. — *Blenkinsopp v. Blenkinsopp*, 495.
2. The general rule of practice of the Court of Chancery, by which a successful appellant is not allowed the costs of his appeal, does not apply to proceedings under the Winding-up Acts, but the * costs of all the * 830 proceedings are in the discretion of the Court. In a case where the official manager succeeded before the Master and on appeal before the Vice-Chancellor in obtaining the name of a party to be included in the list of contributories, but these decisions were ultimately reversed by the Lord Chancellor, the costs of all the proceedings, including the costs of the appeals and in the Master's office, were ordered to be paid by the official manager to the party sought to be charged. — *Ex parte Hall*, 1.

See APPEAL, 2, 4. BILL OF REVIEW. CALL, 1, 2. LUNACY, 1, 3. MARRIED

WOMAN. MORTGAGE, 3. PLEADING, 2. PUBLIC COMPANY. SOLICITOR.
SPECIFIC PERFORMANCE, 5. TAXATION, 1, 2.
COVENANT.

If a man is bound to execute a deed containing particular covenants, and by the desire of those who have a right to call on him to execute that deed he executes another deed containing a covenant that he will obey, observe, and perform all the covenants in the principal deed, he becomes bound by the principal deed. — *Straffon's Executors' Case*, 576.

DEBT. See ASSIGNMENT.

DEBTOR AND CREDITOR. See ARRANGING DEBTOR.

DECREE. See BILL OF REVIEW.

DEED. See FRAUDULENT DEED.

DELAY. See LIMITATIONS. SPECIFIC PERFORMANCE, 3. TAXATION, 2.

DISSENTERS. See SCOTCH KIRK.

DOCUMENTS. See PRODUCTION.

DOMESTIC SERVANT.

A testator by his will gave to each person as a servant in his domestic establishment at the time of his decease a year's wages beyond what should be due to him or her for wages: *Held*, that a head gardener, who lived in one of the testator's cottages and was not dieted by the testator, was not entitled to a year's wages under the will. — *Ogle v. Morgan*, 359.

ECCLESIASTICAL COURT. See FRAUDULENT DEED, 1.

* 831 * ENGINEER. See ASSIGNMENT.

EQUITY. See HUSBAND AND WIFE.

EVIDENCE.

1. An illiterate person who could not write, signed an instrument, purporting to grant all his property to his wife, as her sole and absolute property, and shortly afterwards died. On a suit instituted by the wife to have the husband's heir declared a trustee for her: *Held*, that it was incumbent on the plaintiff to show that the grantor understood the nature of the instrument; and, as the evidence merely showed that the instrument had been read over to the grantor by an unprofessional person who had prepared it, and as to whose capacity to explain it there was no evidence, except such as rendered such capacity very doubtful, the bill was dismissed. — *Price v. Price*, 308.
2. The plaintiff's case was proved by a written document, as well as by the examination of a witness, who was also examined in chief by the defendants, and in the course of such examination referred to the document. The plaintiff relied upon the document before the Vice-Chancellor; but, on appeal before the Lord Chancellor, rested his case upon the examination of the witness only: *Held*, that it was competent for him

to do so, and that the defendant's objection to the reception of this evidence as secondary could only be supported by his producing the written document. — *Ogle v. Morgan*, 359.

3. The plaintiff relied on the defendant's knowledge of a fact said to be communicated to them in a letter, of which no copy was kept, but the receipt of which the defendants admitted. The defendants denied that it contained the statement alleged, but did not produce the letter, or satisfactorily account for its non-production: *Held*, under these circumstances, that the plaintiff's representation must be taken to be true. — *Lumley v. Wagner*, 604.

4. A document containing all the requisites to make it a valid contract, and purporting to be a receipt, though, by reason of its being insufficiently stamped, inadmissible as such, may be received as evidence of the contract. — *Evans v. Protheroe*, 572.

See SCOTCH KIRK. SURETY.

EXECUTOR. See CONTRIBUTORY, 2, 3.

EXONERATION. See TRUSTEE, 1.

FEME COVERT. See MARRIED WOMAN.

* FRAUD.

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Where one contracting party has intentionally misled the other, by describing his rights as being different from what he knew them really to be, it is no answer to the charge of fraud to say, that the party alleged to be guilty of it recommended the other to take advice, or even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defence to the other.

Where one of the parties to a negotiation induces the other to contract on the faith of representations, any one of which has been untrue, the whole contract is to be considered as having been obtained fraudulently; nor is the case varied by the circumstance that the untrue representation was in the first instance the result of innocent error, if, after the discovery of the error, the party who made the representation suffer the other to continue in that error. — *Reynell v. Sprye*, 660.

See PLEADING, 2.

FRAUDULENT DEED.

1. In 1842, a husband, pending proceedings against him in the Ecclesiastical Court for divorce, executed a voluntary settlement of real and personal estate, with the intent of defeating any process in the nature of execution. Sequestration afterwards issued against him under an Act of Parliament not in existence when the settlement was made. On a bill filed by the wife, *held*, that she was entitled to have the deed set aside, and to have an account of the receipts of the trustees from the time of the institution of the suit. — *Blenkinsop v. Blenkinsop*, 495.
2. A trader, being in insolvent circumstances, covenanted by an antenuptial settlement to pay 500*l.* to trustees to be held by them upon trust for such

persons as the intended wife should appoint, and subject thereto upon trust for the intended wife for life for her separate use, then for the husband for life, and then, as to the capital, in trust for the survivor. The settlement also extended to certain property belonging to the intended wife, who was wholly unaware of the intended husband's insolvency: *Held*, on the husband's bankruptcy, that the settlement was valid against the assignees, and entitled the trustees to prove for the 500*l.* — *Ex parte M'Burnie's Trustees*, 441.

FRAUDS, STATUTES OF. See SURETY.

FRIENDLY SOCIETY.

By the rules of a friendly society, it was provided that there should be
 * 833 appointed a treasurer or treasurers, * in whose hands should be deposited all the cash belonging to the society until the same should be placed out at interest; and that, as soon as a sufficient sum should be collected, it should (after leaving in the club box a sufficient sum to pay the sick and other expenses of the society) be deposited in the hands of the treasurer or treasurers of the society, and that the clerk and two stewards should take the same to the bank. No formal appointment of treasurer was made, but the moneys of the society were paid into a bank: *Held*, that the bankers were not "employed" as officers of the society, so as to entitle the society upon their bankruptcy to payment in full. — *Ex parte Orford*, 483.

GAMING. See CERTIFICATE, 1.

GARDENER. See DOMESTIC SERVANT.

GENERAL MEETING. See CONTRIBUTORY, 2.

HUSBAND AND WIFE.

In settling a wife's property under an order of the Court giving effect to her equity to a settlement, there is no established rule entitling her to have the property limited in the events of failure of issue of the marriage, and of her dying in her husband's lifetime, upon such trusts as she shall appoint, and subject thereto upon trusts excluding the husband from any interest in the settled portion of the property. In the absence of special circumstances, the limitation in the events above mentioned should be to the husband; and the facts of his having assigned his interest, and having become insolvent, and of the wife's relations being in humble circumstances, were not held sufficient to justify a departure from the general rule, to the prejudice of a purchaser from the husband. — *Carter v. Taggart*, 286.

See MARRIED WOMAN.

INCUMBRANCE. See MORTGAGE, 1, 2. SOLICITOR.

INFANT.

By marriage settlement a sum of stock was vested in trustees, upon trust
 * 834 to pay the dividends to the husband and wife, and the survivor * during
 [644]

life, upon the condition that they should, during the minorities of their children, find and provide them with suitable diet, clothing, and general maintenance and support, in proportion to the circumstances and condition in life of the husband and wife, and to the expectancies of the children; the husband subsequently presented a petition under the Insolvent Debtors Protection Act, upon which an official assignee was appointed, and an order for protection granted on the terms of his paying 30*l.* a year out of the dividends of the settled estate, in discharge of his debts: the husband and wife afterwards assigned all their interest in the trust fund to R. O., an assignee, for valuable consideration. The trustees having paid the fund into Court under the provisions of the Trustees Relief Act, the infant children presented a petition asking that the dividends of the whole trust fund might be applied for their maintenance and support, the amount being not more than sufficient for that purpose: this petition was opposed by R. O. The Lord Chancellor, however, made the order, holding that, under the terms of the settlement, the children were entitled; but without deciding what he would have done if it had been shown that the money borrowed from R. O. had been directly for the benefit of the children, and without determining what was the effect on the interest of the husband of the order for protection. *Held*, also, that the question raised was a matter which it was competent for the Court to deal with on petition under the Trustees Relief Act. — *Re Dalton*, 265.

INJUNCTION.

1. J. W. agreed with B. L. that she, J. W., would sing at B. L.'s theatre during a certain period of time, and would not sing elsewhere without his written authority: *Held*, on a bill filed to restrain J. W. from singing for a third party, and granting an injunction for that purpose, that the positive and negative stipulations of the agreement formed but one contract, and that the court would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract. *Kemble v. Kean*, 6 Sim. 333, and *Kimberley v. Jennings*, 6 Sim. 340, overruled. — *Lumley v. Wagner*, 604.
2. An incorporated company were improving a harbour under the powers of an Act, whereof the provisions of the Lands Clauses Consolidation Act, 1845, were made part. In the course of the works a coffer-dam was made, which temporarily prevented ships from approaching so near the warehouses adjoining the harbour as they had been accustomed to do. A lessee of such a warehouse * claimed compensation for the * 835 damage thus occasioned to him to the amount of 65*l.*, or to have the same ascertained by arbitration. The Court refused to grant an injunction restraining him from proceeding under the compensation clauses of the Lands Clauses Consolidation Act.

Seemle, that a company does not, by nominating under protest an arbitrator, in pursuance of the Lands Clauses Consolidation Act, 1845, admit that the case is one entitling the claimant to any compensation.

Where a bill had been filed by a company for an injunction in the circumstances above stated; and on an appeal from an order, dismissing the bill without costs, the cause was by consent treated as having come on regularly to be heard: the Court held that the suit was justified by the decision in *London and North-Western Railway Company v. Smith*, and gave no costs, but gave the defendant leave to apply as to costs if he succeeded in obtaining compensation. — *Sutton Harbour Improvement Company v. Hitchens*, 161.

3. By three Acts of Parliament of the same session, a railway company was empowered to make three distinct lines, forming a cluster, and not a continuous line. In the next session an Act was passed declaring the company to have been and to be only one company, and authorizing and requiring them to grant a lease of the lines to another company. They completed only one of the lines, which was worked by the other company under the provisions of the last Act. Some months after it was obvious that the other two lines could not be completed within the time prescribed by the Acts, a shareholder in the first company filed a bill, seeking to restrain it from applying its funds otherwise than for the purpose of constructing all three of the lines; but he did not make the company, who were lessees, parties to the suit. *Held*, that more inconvenience would arise from the Court interfering than from its abstaining to do so; and on this account, as well as on the ground of acquiescence, and want of parties, an injunction granted by the Court below was dissolved.

Quære whether railways forming a cluster, differ from a continuous line with respect to the propriety of granting an injunction against the construction of part only of an undertaking authorized by the legislature. — *Hodgson v. Earl of Powis*, 6.

See PLEADING, 1. RAILWAY COMPANY. SURETY.

INQUIRY. See LIMITATIONS.

INQUISITION. See LUNACY.

* 836 * INSOLVENCY. See INFANT.

INSOLVENT. See COMMISSIONER.

INSPECTION. See BANKRUPTCY.

INTEREST.

The allowance of interest upon a legacy charged upon real estate, and due upwards of six years, is to be calculated from the filing of the bill, and not from the date of the decree, though the bill is not filed by the legatees. — *Chappell v. Rees*, 393.

. See ACQUIESCENCE.

INVESTMENT. See TRUSTEE, 3.

JOINT-STOCK COMPANY. See CONTRIBUTORY, 3, 4.

JURISDICTION. See ADJUDICATION, 1. CERTIFICATE, 4. LUNACY, 3.

LACHES. See LIMITATIONS. TAXATION, 2.

LAND-OWNER. See ACQUIESCENCE.

LANDS CLAUSES CONSOLIDATION ACT. See ACQUIESCENCE. INJUNCTION, 2. SERVICE.

LEGACY. See CHARITY. DOMESTIC SERVANT. INTEREST. PARTNERS. TRUSTEES, 2. WILL, 2.

LEGATEE. See MARSHALLING.

LETTERS OF ADMINISTRATION. See ADMINISTRATION, 1, 2.

LIEN. See ASSIGNMENT. SOLICITORS. TRUSTEE, 2.

LIMITATIONS.

On March 4, 1811, an agreement was entered into for the purchase of freehold land for 6300*l.*, to be paid on the 18th of May, 1811, and the purchasers were immediately put into possession. In 1827, the purchaser, before any conveyance was made to him, and * 837 paid any part of the purchase-money, died, having devised the lands to trustees. The trustees disclaimed, and others were appointed by the Court of Chancery. In 1834, the attorney of these trustees wrote to the assignees of the vendor (who had become bankrupt), stating that the purchase-money was ready to be paid on the purchase being completed. On a bill filed by the assignees in 1844, to enforce the lien to which the Statute of Limitations, 3 & 4 Will. 4, c. 27, was set up as a defence by answer: *Held*, —

1st. That the trustees were persons by whom the purchase-money was payable within the meaning of the Statute of Limitations, 3 & 4 Will. 4, c. 27, § 40.

2d. That the acknowledgment of their attorney in 1834 was sufficient within the meaning of the exception in the Act to withdraw the case from its operation, and, for this purpose, to bind the *cestuis que trustent*, although the trustees were appointed not by or under any powers contained in the will, but by the Court of Chancery,

3d. That the answers claiming the benefit of the statute must be considered as alleging that no acknowledgment of the right to receive the money had been given or signed by the person by whom it was payable, or his agent; and that, therefore, although the bill did not allege any acknowledgment to have been made, the plaintiffs were entitled to put the acknowledgment in evidence on an appeal, although it was not read or proved at the original hearing.

4th. That this only applied to the trustees who had admitted the agency of the attorney, but that, as against other defendants who had not made a similar admission, the assignees were entitled to an inquiry as to any acknowledgment having been given. — *Tuft v. Stephenson*, 28.

LUNACY.

1. Where a petition for a commission of lunacy stated that the alleged lunatic had been of unsound mind for upwards of thirty years, a *cestui que trust*, under a settlement made during this period, was allowed to attend the execution of the commission, upon an undertaking to abide by such order as the Court might make as to any increased costs occasioned by the attendance. — *In re Richards*, 709.

2. *Held*, on application to the Lord Chancellor for that purpose by a person

found lunatic under a commission, that leave to traverse the inquisition is matter of right.

The same holding applies to a similar application by another person having an interest, *semble*.

- The fact of the traverse being matter of right does not, however, preclude
- * 838 the Lord Chancellor from exercising such a control over the *matter as may be necessary for the protection of the person and estate of the alleged lunatic, as, for instance, by satisfying himself that the application is *bond fide*, and that the alleged lunatic, where he is the person applying, is competent to judge of what he is doing and is really desirous that the traverse shall issue.

Whether, if the Lord Chancellor should not be otherwise able to satisfy himself on the points above mentioned, he would allow any and what evidence to be gone into respecting them, *quære*. — *In re Cumming*, 537.

3. After the finding of a jury upon a traverse of an inquisition of lunacy, that the alleged lunatic was of a sound mind, the Court, acting in the jurisdiction in lunacy, has no authority under the 6 Geo. 4, c. 53, or otherwise, to direct payment out of the property of the alleged lunatic of any costs incurred with reference to the commission, although the verdict upon the traverse does not negative the lunacy at the time of the original inquisition.

Nor does a petition of the alleged lunatic for a *supersedeas* and the delivery up of his papers and other property by the committee and the petitioners for the commission, entitle them to their costs as part of the terms on which such an order should be made, even where the Court has, by an order in the lunacy made before the verdict on the traverse, directed the costs to be taxed. — *Ex parte Loveday*, 375.

4. Where the Court considered it expedient in the circumstances of the case that, pending a traverse, the system of personal care of the supposed lunatic should not be disturbed, and that she should continue to receive her income, the appointment of committees and the execution of the grant were not stayed on that account, but the order for the appointment and grant was qualified by the introduction of directions to the above effect. — *In re Cumming*, 561.

5. In a case where the dissolution of a partnership had been decreed in consequence of the lunacy of one of the partners, and large sums had been paid into Court to the separate account of the lunatic in respect of his share of the capital and profits of the business, the Lord Chancellor, on being subsequently satisfied of the complete recovery of the lunatic, ordered the fund to be paid out to him.

Mode of proceeding in such cases. — *Leaf v. Coles*, 417.

LUNATIC. See MORTGAGE, 3.

MAINTENANCE. See CHAMPERTY. INFANT.

- * 839 * MARRIED WOMAN.

A married woman filed a bill, suing *in formâ pauperis*, under an order

of the Court, without a next friend, and obtained a decree. On an unsuccessful appeal, the appellant was ordered to pay to the plaintiff herself *dives* costs. — *Wellesley v. Wellesley*, 501.

See HUSBAND AND WIFE.

MARSHALLING.

A testator devised real estates upon trust for payment of his debts, funeral and testamentary expenses, and subject thereto upon various trusts; and bequeathed legacies and annuities: *Held*, a case for marshalling at the instance of a legatee of an annuity, where the personal estate had been exhausted in payment of debts. — *Paterson v. Scott*, 531.

MORTGAGE.

1. A. having a reversionary interest in personalty, which he had mortgaged first to B., and then to C., agreed to sell it to D., and D. having at A.'s request paid off B. out of the purchase-money, A. agreed that, until the sale should be completed, D. should stand in the place of B. and have the benefit of B.'s security. In the memorandum in which the agreement was expressed, there was a recital that the payment had been made to B. out of the purchase-money and in discharge of her debt: *Held*, that B.'s debt was not extinguished, but that D. was entitled to the benefit of B.'s security.

The rules as to tacking one mortgage to another apply to foreclosure as well as redemption suits, and to mortgages of equitable personalty, by way of trusts for sale as well as to ordinary mortgages of real estate. — *Watts v. Symes*, 240.

2. A. B., on his marriage, settled certain estates then in mortgage on himself for life, with remainder to his first and other sons in tail, and covenanted against incumbrances; he afterwards mortgaged other estates, and became insolvent. A bill was filed by his assignee under the insolvency against the several incumbrancers on all the estates and against the tenant in tail, praying an account of what was due on the several incumbrances, that their priorities might be ascertained, and for a sale or redemption. A decree was made in the suit, directing that, on the plaintiff and defendant, the tenant in tail, paying what was due on the respective incumbrances, the unsettled estates should be conveyed to the party redeeming, and that the settled estates should be conveyed on the trusts of the settlement, and, in default of redemption, that the bill should be dismissed: *Held*, by the Lord Chancellor, that the decree for redemption, being permissive only as against the tenant in tail, was * correct, and that a decree for a sale would have been * 840 improper. — *Chappell v. Rees*, 393.

3. The costs of the proceedings for obtaining from the committee of a lunatic a reconveyance of premises mortgaged to the lunatic will be ordered to be paid out of the lunatic's estate, where the lunatic is beneficially interested in the mortgage money, and the petition is presented by the committee.

This rule will not, however, be acted on if the mortgagor presents the petition,

unless in cases where the committee had declined to take that step. — *In re Wheeler*, 434.

4. Where a mortgagee in fee (who has never been in possession or in receipt of the rents and profits) has died intestate as to the mortgaged hereditaments, and his heir cannot be found, the Court may, under the Trustee Act, 1850, make an order, vesting the legal estate in his executors. — *In re Boden's Trust*, 57.

See BUILDING SOCIETY. TRUSTEE, 1.

NEXT FRIEND. See MARRIED WOMAN.

NEXT OF KIN. See WILL, 2.

NOTICE. See CERTIFICATE, 3. SOLICITORS.

OFFENCES. See PROTECTION.

OFFICER. See FRIENDLY SOCIETY.

OFFICIAL MANAGER. See CALL, 1. COSTS, 2.

ONUS PROBANDI. See EVIDENCE, 1.

ORDER. See APPEAL, 8.

ORDER AND DISPOSITION. See REPUTED OWNERSHIP.

PARI DELICTO. See CHAMPERTY.

PAROL EVIDENCE. See SURETY.

PARTICULARS OF DEMAND.

In particulars of demand served by a fruit merchant on a grocer, together with a summons under the Bankrupt Law Consolidation Act, the word "goods" was held to describe the wares supplied, sufficiently to prevent an adjudication from being annulled, on the ground of uncertainty in the particulars.

- * 841 * What is convenient certainty depends on the situations of the parties as well as the nature of the demand. — *Ex parte Bower*, 468.

PARTNERS.

Decree made for the dissolution of partnership in consequence of the lunacy of one of the partners. — *Leaf v. Coles*, 171.

See LUNACY, 5.

PARTNERSHIP. See CONTRIBUTORY, 2.

PAUPER. See MARRIED WOMAN.

PAYMENT INTO COURT. See ACQUIESCENCE.

PAYMENT OUT OF COURT. See ADMINISTRATION, 1.

PENSION. See COMMISSIONER.

PERPETUITY.

By a settlement, family estates were vested in trustees, upon trusts to raise moneys towards the discharge of incumbrances: and, subject thereto, upon trust for a father for life, with remainder to his eldest son for life,

without impeachment of waste, subject to a power thereafter given to the trustees, with remainder to the first and other sons of the son in tail male, with remainder to the heirs and assigns of the father in fee. The power given to the trustees was, that it should be lawful for them at any time or times thereafter, so long as there should be any mortgage upon the estates (but, after the death of the father, not without the consent of the son, if living, in writing), to sell timber upon the estates, and to apply the proceeds in discharge of the incumbrances. *Held*, that the power in the trustees to cut timber, so long as any mortgage debt remained, was paramount to any right in the son to cut timber.

Held also, that the power was not to any extent invalid as tending to perpetuity. — *Briggs v. The Earl of Oxford*, 363.

PETITION. See SERVICE.

PLEADING.

1. At the hearing the Court may grant an injunction, though it is not prayed for by the bill. — *Beynell v. Sprye*, 660. •
2. Where relief in equity is sought against a person alleged to have obtained an instrument by fraud, or otherwise improperly from the plaintiff for the benefit of the defendant, and the facts alleged as constituting or showing the fraud or impropriety are proved * against him, and do * 842 constitute or show the fraud or impropriety, the suit will not fail, because the bill may have incorrectly and untruly alleged a third person to have been a participator and joint actor in the facts, although such an incorrect mode of stating the case may affect the costs. — *Reynell v. Sprye*, 660.

See LIMITATIONS. TRUSTEES, 4.

POWER. See PERPETUITY. TRUSTEE, 1.

PRACTICE. See LUNACY, 5. PRODUCTION.

PREROGATIVE COURT. See ADMINISTRATION, 1, 2.

PRESUMPTION. See EVIDENCE, 3.

PRINCIPAL. See SURETY.

PROCEEDINGS. See BANKRUPTCY.

PRODUCTION. •

Upon a motion for production of documents in the defendant's custody, the Court will not receive evidence extraneous to the answer, to show that a particular document had been fraudulently omitted from the schedule, although the defendant does not object to the admission of the extrinsic evidence, and has adduced evidence to contradict it. — *Reynell v. Sprye*, 656.

PROOF. See FRIENDLY SOCIETY.

PROTECTION.

The commissioner may on the occasion referred to in the 256th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), refuse to grant the bankrupt further protection on other grounds than for one of the offences specified in that section. The term "further protection" in the 257th section is not exclusively referable to cases in which further protection has been refused on account of the commission of any of the

offences specified in the 256th section; and the certificate in the form contained in the schedule (Ba), and mentioned in the 257th section, may be granted where further protection has been refused on other grounds than for one of the offences enumerated in the 256th section.

The words "this enactment," in the 259th section, are not referable to

- * 843 the whole Act, but to the * particular section only. — *Ex parte Stanton*, 224.

See ARRANGING DEBTOR.

PUBLIC COMPANY.

Previously to the passing of the Winding-up Act, 1848, a joint-stock company was dissolved under provisions contained for that purpose in the deed of settlement of the company, and a committee was appointed for winding up its affairs. Finding it impossible to do this in the then existing state of the law, the committee incurred a considerable bill of costs in attempting, through their solicitor, to get the public Acts of Parliament, which at that time were being brought forward, made applicable to the case of the company, and finally in urging forward the passing of the Winding-up Act itself. On the passing of that Act an order was obtained for winding up the company. The committee then claimed to be paid out of the assets of the company the amount of their solicitor's bill of costs; but this claim was disallowed, on the ground that the matters in respect of which the costs were incurred were beyond the power of the committee. — *Ex parte Cropper*, 147.

See CALL, 1. CONTRIBUTORY, 2, 3, 4. INJUNCTION, 2, 3. RAILWAY COMPANY.

PUBLIC POLICY.

Where the parties to a contract against public policy, or illegal, are not in *pari delicto*, and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him. — *Reynell v. Sprye*, 660.

See CHAMPERTY. COMMISSIONER.

PURCHASER. See TRUSTEE, 1.

RAILWAY COMPANY.

Lessees of premises, occupied by them as a ropery, agreed to withdraw their opposition to a bill in Parliament for a railway which would intersect the ropery. The agreement, among other stipulations, provided that the railway should be so constructed as that when finished the level of the ropery should not be altered, nor the surface of the ropery be in the least respect diminished. *Held*, that the railway company were bound to restore the surface, to be available for all purposes to which it might have been applied before the construction of the railway, and not for the purposes of a ropery only. — *Harby v. The East and West India Docks, &c., Railway Company*, 290.

- * 844 See ACQUISCEENCE. ASSIGNMENT. * CALL, 1. INJUNCTION, 3. SPECIFIC PERFORMANCE, 2, 3, 4.

RAILWAY STOCK. See CERTIFICATE, 1.

RECEIPT. See EVIDENCE, 4.

RECEIPT CLAUSE. See TRUSTEE, 1.

RECONVEYANCE. See MORTGAGE, 3.

REDEMPTION. See BUILDING SOCIETY. MORTGAGE, 2.

REHEARING. See CERTIFICATE, 4.

REPUTED OWNERSHIP.

A mortgagee of goods under a power of sale allowed the goods to remain in the order and disposition of the mortgagor, until the latter committed an act of bankruptcy, but took possession before any petition of adjudication was filed. On the mortgagor being found bankrupt, the messenger took the goods out of the mortgagee's possession and sold them. The mortgagee brought an action of trover and recovered, on the ground that, under the Bankrupt Law Consolidation Act, 1849, the assignees could not sell, without an express order of the commissioner, goods in the reported ownership of a bankrupt. The assignees applied to the commissioner, who made an order retrospectively confirming the sale, and reciting as a fact that the goods were in the order and disposition of the bankrupt at the time of the bankruptcy, with the permission of the true owner. *Held*, that the mortgagee was not entitled to have the order discharged on his appeal, as being invalid on the face of it; and, on the appellant declining to enter into the question whether he had notice of the act of bankruptcy, when he took possession, his appeal was dismissed with costs. — *Ex parte Heslop*, 477.

RETIRING SHAREHOLDER. See CONTRIBUTORY, 2.

RETROSPECTIVE CLAUSE. See CERTIFICATE, 2.

REVIEW. See ADJUDICATION, 1. BILL OF REVIEW.

SALE. See MORTGAGE, 2. SPECIFIC PERFORMANCE, 1, 5. TRUSTEE, 1.

* SCOTCH KIRK.

* 845

A chapel in England was founded between the Restoration and the Revolution, without any deed or document declaring the purposes for which it was to be used, but it appeared that from the foundation the services had always been conducted in conformity with "the Directory," by which the mode of worship in the Church of Scotland is regulated.

Held, that the chapel must be treated as appropriated to the purposes of religious worship according to that Directory, and, therefore, according to the Presbyterian form.

A minister of such a chapel had been ordained by a Scotch presbytery. He afterwards became a member of a synod assembled in England, which adhered to certain resolutions respecting church patronage in Scotland. Subsequently a general assembly of the Church of Scotland enacted, that all members of that synod who so adhered were no longer members of, or in communion with, the Church of Scotland. *Held*, that the minister was thereby deprived of his *status* of an ordained minister of

the Scotch, or of any Presbyterian church, and became disqualified from acting as the minister of the chapel (independently of any question whether it was necessary for him to be a Scotch minister or licentiate), it being an essential part of the Presbyterian system that none but ordained ministers or licentiates should perform divine service.

Seemle, per Lord Justice KNIGHT BRUCE, that with respect to a question of property it is competent for a congregation of dissenters, acting unanimously and with the concurrence (where they have trustees) of their trustees, to introduce effectually into their system and constitute new regulations, not in contravention of any deed of trust, and not opposed in principle to the original constitution; and that it is competent for such a congregation in England to resolve effectually, though not irrevocably, that every future minister shall be a person in communion with the Established Church of Scotland.

The effect of usage as evidence of the trusts, on which a dissenters' place of worship is held, varies greatly in different circumstances, and, the Court differing in opinion upon the evidence whether it was a necessary qualification for a minister of a particular chapel to be a minister or licentiate of the Church of Scotland, the decree of the Court below, declaring that qualification to be necessary, was affirmed, as well as other portions of the decree with which both members of the Court agreed. — *Attorney-General v. Murdoch*, 86.

SERVICE.

* 846 The petition of a tenant for life under * the Lands Clauses Consolidation Act, 1845, for re-investment in the purchase of land of the proceeds of settled property taken by a railway company, need not be served upon any person entitled in remainder. — *Ex parte Staples*, 294.

SEQUESTRATION. See FRAUDULENT DEED, 1.

SETTLEMENT. See FRAUDULENT DEED, 1, 2. HUSBAND AND WIFE. INFANT. PERPETUITY. VOLUNTARY SETTLEMENT.

SHARE. See CONTRIBUTORY, 2, 3, 4.

SOLICITOR.

A purchaser of property subject to a mortgage made, before the completion of his purchase, a second mortgage of it. He afterwards created a third mortgage, with respect to which the second mortgagee's conduct was such as to give it priority over his. Then the purchase was completed, the purchaser paying off the first mortgage, and taking a conveyance to a trustee for himself. On this occasion the title-deeds were handed to his solicitors, who afterwards took a transfer of the third mortgage. One of them was the trustee for the purchaser in the conveyance. The second mortgagee did not give them, nor had they any notice of his security.

Held, that, nevertheless, their lien, either for their general bill of costs, or for their costs relating to the conveyance, could not prevail against the second mortgagee, the rights of a solicitor in respect of his lien for his bill of costs being no greater than those of the client, and the circumstances of the case not exempting it from the scope of this rule.

Quare, whether the lien of a solicitor is affected by his taking a partner. — *Pelly v. Waihen*, 16.

See ASSIGNEES. TAXATION, 1, 2.

SPECIFIC PERFORMANCE.

1. One of two tenants in common in fee of lands containing mines of coal and iron entered into a negotiation for a lease of minerals, and wrote a letter stating his willingness to grant a lease on the terms of a paper referred to in the letter. There were two papers, each of which in some respects answered the description in the letter. One of these purported to be terms for letting and taking coals, "&c.," under the lands in question, but contained no more definite description of the minerals which were the subject of it. In a suit by the proposed lessee for specific performance as to the moiety belonging to the tenant in common who had written the letter, *held*, —

That the paper to which the * letter referred was not sufficiently identified. * 847

That even if, as the plaintiff contended, it was shown to be the above paper, its terms were too indefinite to be capable of being enforced specifically.

That the contract being for a lease of the entirety, and the defendant not having been shown to have made any misrepresentation as to his title or otherwise, it could not be enforced against him as to one moiety only. — *Price v. Griffith*, 80.

2. The promoters of a railway company, in consideration of a land-owner's opposition to the bill being withdrawn, agreed to pay him 4500*l.* as the purchase-money of land, not exceeding eight acres, to be taken by the company for the formation of this railway and for consequential damage. The Act was obtained, and the agreement adopted by the company in consideration of the land-owner releasing the promoters from their covenant. The agreement was so framed as to render it doubtful whether it was not to be contingent on the formation of the railway. The railway was abandoned, and after the expiration of the time*limited for the acquisition of land for the purposes of the undertaking by the company, the land-owner filed a claim for a specific performance of the agreement: *Held*, to be a case in which a decree would produce more injustice than justice; and a specific performance was therefore refused. — *Webb v. The Direct London and Portsmouth Railway Company*, 521.

3. Heads of agreement were signed by agents, on behalf of a railway company, which was soliciting a bill in Parliament for a branch line, and an opposing land-owner. Among other stipulations, they provided that 400*l.* per acre was to be paid "for the land required" in one set of parcels, other sums for the "land required" in other sets of parcels, and 1000*l.* for depreciation of homesteads. On these heads being signed, the land-owner withdrew his opposition, and the bill passed in July, 1847. It limited the time for completing the line to five years from the passing of the Act. In September, 1847, the solicitors of the land-owner sent

to the company the draft of a proposed and more detailed agreement, in order that such an agreement might be formally executed by the company. After repeated applications to them to have the draft agreement returned, the company's solicitors, in October, 1848, stated that the matter was not pressing, as there was no present intention of making the line. In December, 1848, the company's solicitors returned the draft agreement, so settled as to make it conditional on the formation of the railway. The land-owner's solicitors immediately objected to this construction of the heads of agreement; * and on the 30th of January, 1849, stated, that unless the company were prepared to execute an absolute agreement, proceedings would be taken at once to compel the formation of the line. In February, 1849, the company expressed (by their solicitors) their intention to abide by the alterations in the draft agreement, and to accept service of any process. In July, 1850, the land-owner filed a claim for specific performance.

Held, that the agreement was not sufficiently definite to be enforced.

That the delay was a sufficient answer to the suit.

That the remedy by way of specific performance failed for want of mutuality, and by reason of an action at law affording complete justice.

On the defendants undertaking to admit in an action that the heads of agreement were adopted under their corporate seal, the claim was dismissed.

— *Lord James Stuart v. The London and North-Western Railway Company*, 721.

4. A railway company applied to Parliament for powers to make a branch between W. and S., with a diverging line to join another railway. They also contemplated a junction with the other railway, by means of a more direct diverging line, but this project was not on the deposited plan. The line between W. and S. intersected the lands of the plaintiff, as to a portion of which he was seised in fee-simple, and as to another portion only for life. The plaintiff opposed the scheme; and in consideration of the withdrawal of his opposition, the company by deed, under their corporate seal, agreed to purchase the whole of his lands, and to obtain the necessary powers for enabling him to convey in fee-simple. The purchase-money was payable eighteen months after the passing of the Act. The agreement was entered into by the company with reference to the projected diverging line not before Parliament, but of this the plaintiff was not aware. The Act passed, limiting the construction of the branch between W. and S. The company abandoned the intention of making the branch, and gave notice to the plaintiff that they did not require any of his land. The bill was filed within three months and a half after the receipt of this notice, and twenty-three months after the passing of the Act. *Held*, that the company were bound specifically to perform the agreement; and that it was not a valid objection to the enforcement of the contract, that to make a good title would involve the necessity of an application to Parliament. — *Hawkes v. The Eastern Counties Railway Company*, 737.

5. On a sale of real estate by a trustee under a will open to suspicion as

having been obtained by undue influence, the title was approved, but before the actual completion * of the contract the heir-at-law * 849 gave notice that he intended to dispute the will, and brought an action against the tenant for rent: the purchaser thereupon refused to complete, a bill for specific performance was filed, but before it came to a hearing, the action brought by the heir was tried, and a verdict given against the heir: a reference as to title was then directed, and the Master having reported in favour of the title, a decree was made for specific performance. On appeal, however, by the purchaser, the Lord Chancellor (Lord COTTENHAM) ordered the case to stand over generally, with liberty for the vendor to take such proceedings for establishing the will as he should be advised. The vendor then instituted a suit against the heir, which resulted in the will being established. The Lord Chancellor (Lord TRAUB) thereupon confirmed the decree for specific performance, and directed the purchaser to pay interest from the time when under the contract the sale ought to have been completed, and also to pay the costs of the suit subsequently to the hearing when the reference as to title was directed: his Lordship *held*, that at that time there had been such reasonable inquiry into the title as ought to have satisfied the purchaser, and that therefore the consequences of the further proceedings by which the will was established, both in reference to the costs of the suit for specific performance and the payment of interest, must fall on the purchaser.

The judgment of Lord COTTENHAM, in this case, 2 Phil. 619, observed upon.

— *Grove v. Bastard*, 69.

See INJUNCTION, 1.

STAMP. See EVIDENCE, 4.

STATUTE. See LIMITATIONS.

STATUTE OF FRAUDS. See SURETY.

STOCK. See CERTIFICATE, 1.

SUMMONS. See ARRANGING DEBTOR.

SUPPLEMENTAL BILL. See BILL OF REVIEW.

SURETY.

A. B. entered into a bond as a surety: the creditor subsequently took from the principal debtor a promissory note for the amount, payable in two months, but afterwards in consequence of the insolvency of the debtor sued A. B. on the bond. A. B. then filed his bill, to restrain the action on * the ground that he was discharged from liability by the * 850 giving of the promissory note: the creditor, by his answer, denied that such was the effect of the transaction; and on the hearing an inquiry was directed in respect of the circumstances under which the promissory note had been given. The Master reported that, though there was not any written or any distinct parol agreement between the parties, yet that there was a general understanding that the giving of the note was not to affect the bond: *Held*, on further directions, that, under these circumstances, there was no case for the interference of a Court of Equity.

A transaction, which would otherwise operate as a release of a surety, will

not have that effect if the remedy against the surety is reserved; and the question therefore in the above case was, there being no special ground for equitable relief, whether an agreement to reserve the rights against the surety really existed: *Held*, on the evidence and the Master's report founded on it, that such an agreement did exist, and also that parol evidence was admissible to prove it. — *Wyke v. Rogers*, 408.

TACKING. See MORTGAGE, 1.

TAXATION.

1. Under the Solicitors Act, items struck out of bill of costs on taxation, as not chargeable against the person to whom the bill is delivered, must be taken into account in determining the costs of taxation.

An attorney delivered a bill of costs to a client, comprising the costs of an unsuccessful and desperate action of replevin, which the attorney had brought, not in the name of the client, but (as the attorney alleged) by the client's direction.

The evidence adduced to prove this allegation was held by the Court to be insufficient.

Held, that the item could not be allowed; and, *semble*, that it could not be enough for the attorney to prove the direction to have been given, without also proving that he had properly advised the client as to the desperate character of the proceeding.

Semble, that it was within the functions of the taxing officer to require proof of such direction, and of such advice having been given, before he allowed an item in respect of the action.

Quære how far an attorney is justified, as between him and his client, by the opinion of counsel in prosecuting an action which is unsuccessful, and which the Court considers to have been groundless. — *Re Clarke*, 43.

- * 851 2. To constitute a case for taxation of costs after payment on the * ground of undue pressure, the pressure must have been of such a kind as to have rendered it impossible or difficult to have the costs taxed before payment in the ordinary course. An unexplained delay of nine months after payment in the presentation of a petition for taxation on such grounds held fatal to the application.

To support such a petition, on the ground of extravagant and improper charges, the allegations directed to that point must be specific, and must be such as to amount to evidence of fraud. — *In re Browne*, 322.

TIMBER. See PERPETUITY.

TIME. See ADJUDICATION, 2. ANNULLING, 2. APPEAL, 3. INTEREST. LIMITATIONS.

TITHES.

The case of a money payment in lieu of tithes made upon an annual value is not like that of an ordinary composition, and it requires strong evidence to make out that such a payment is to be treated as a composition; and

if the annual payment is less than the annual value, the mere circumstance of the receipt of the annual payment will not establish it as a composition.

Whether, assuming such a payment to be made and received as a composition, the same notice is necessary to determine the composition as is requisite in the case of one relating to a common render of tithes, *quære*.

Form of reference to the Master to ascertain the value of the London Corn Exchange in regard to its liability to tithe under the Act 37, Hen. 8, c. 12.

— *Letts v. The London Corn Exchange Company*, 398.

TITLE. See SPECIFIC PERFORMANCE, 5.

TRANSFER. See CONTRIBUTORY, 4.

TRAVERSE. See LUNACY, 2, 3, 4.

TREASURER. See FRIENDLY SOCIETY.

TRUST. See EVIDENCE, 1. SCOTCH KIRK. VOLUNTARY SETTLEMENT.

TRUST DEED. See ANNULLING, 2.

TRUSTEE.

1. A testator, by his will, after appointing three persons his executors, gave to them the residue of * his personal estate, and directed them, * 852 or other the trustees to be appointed under the provisions contained in his will, to stand possessed of his residuary personal estate, upon trust, at such time or times as to them should seem meet, to sell and convert into money all such part thereof as should not consist of money, and invest the produce in securities, and to stand possessed of the same upon trust thereout to pay his funeral expenses and debts, and certain large legacies which he specified, and to stand possessed of the residue for his two sons equally; and the will contained in a clause which, according to the construction put on it by the Court, empowered the trustees to give receipts. Sixteen years after the death of the testator, the then acting trustees of the will, who were not the executors, raised money upon a deposit of the title-deeds of two leasehold houses, part of the testator's residuary estate. *Held*, dismissing a claim filed by the mortgagees to enforce their securities, that, inasmuch as the trusts of the will showed a conversion out and out of the testator's property to be absolutely necessary, the trustees were not authorized in raising money by mortgage.

A power of sale out and out, and having an object beyond the raising of a particular charge, does not authorize a mortgage, but where the power is for raising a particular charge, and the estate is settled or devised subject to that charge, it may be proper to raise the money by mortgage, and such a mortgage will be supported as a conditional sale.

Where a trust is created by will for the payment of debts and legacies, a purchaser or mortgagee is not bound to see to the application of the money raised, the principle referable to such a case being that the testator has shown his intention to be to intrust the trustees with the power of receiving and applying the money.

Persons, however, who deal with trustees raising money at a considerable distance of time, and without apparent reason for so doing, are under an obligation to inquire and see that no breach of trust is being committed.

Distinction in reference to the raising of money, but not apparently for the payment of a charge, between the case of a man who is owner as well as trustee, and that of a man who holds the property merely as trustee subject to a charge.

Clause in a will, enabling trustees to give receipts in a particular case specified, construed in favour of the intention of the testator to confer a power to give receipts generally. — *Stroughill v. Anstey*, 635.

- * 853 2. A testator directed his trustees to raise a sum of money, the income of which would produce a clear income of 100*l.* per annum, * and to invest it upon government or real securities, and pay an annuity of 100*l.* to a legatee; and he directed them to stand possessed of the fund so raised and the securities on which it should be invested, but subject to and charged with the annuity, on the same trusts as the residue; and he directed that, if the income of the trust fund should, *from any cause or circumstance* whatever, prove insufficient to answer the annuity, the deficiency should be made good out of the residue. The trustees invested a sum of 3500*l.* on a mortgage at 5*l.* per cent; and the annuitant, who was one of the trustees, assigned the annuity to a purchaser, by a deed reciting that the 3500*l.* was appropriated to answer it. He afterwards was permitted by his co-trustees to call it in, and to misapply it. *Held*, first, that the recital in the assignment precluded the purchaser of the annuity from being heard to say that there had not been an effectual appropriation of the fund to answer it; secondly, that the provision in the will as to the insufficiency of the fund did not apply to the case; thirdly, that, although the legatee of the annuity was only one of the trustees of the will, the purchaser from him could take no part of the assets till his defalcation was made good; fourthly, that, on all these grounds, the purchaser of the annuity had no claim upon the residue. — *Barnett v. Sheffield*, 371.

3. Where a testator directs his trustees to invest trust-moneys in parliamentary stocks or funds, or on real securities, and they omit so to invest it, the *cestuis que trustent* have not the option of charging them with the moneys which would have been produced if the moneys had been invested in the funds, but are only entitled to have the trust-moneys replaced, with interest at 4*l.* per cent.

It is not necessarily a breach of trust under such a will to continue in their actual state of investment part of the assets, consisting of turnpike bonds. — *Robinson v. Robinson*, 247.

4. By a settlement, lands were assured to A. and B. upon certain trusts, with a power, in case they or either of them, or any trustee or trustees to be appointed under the power, should die or become unwilling to act, for the settlor, during his life, and after his decease, for the acting trustees or trustee for the time being, or for the executors or administrators of any surviving trustee, to nominate any fit person or persons to supply the place of the trustees or trustee so dying or becoming unwilling to act. A. never executed the deed, nor acted. After A.'s death, B., being desirous of retiring, nominated C. to be a new trustee, and conveyed to

C. all the trust estate. Afterwards, on account of doubts as to the validity of this appointment, the executor of B. executed a deed appointing C. and D. to be * trustees of the settlement in the place * 854 of the original trustees; and by the same deed, C. conveyed the property to the use of himself and D. They then sold the trust estate under a power of sale in the settlement. *Held*, that the survivor of the original trustees had not been guilty of a breach of trust in appointing only one new trustee, and that the two new trustees were well appointed, and had validly exercised the power of sale so as to exonerate the purchasers from responsibility.

The bill contained an allegation that the new trustee was, when the sales were made, the sole trustee of the settlement. *Semble*, that this allegation would not have precluded the plaintiff from insisting upon the invalidity of the appointment of that trustee, if the appointment had been invalid. — *Miller v. Priddon*, 335.

See INFANT. MORTGAGE, 4.

TRUSTEES RELIEF ACT. See INFANT.

ULTRA VIRES. See SPECIFIC PERFORMANCE, 4.

USAGE. See SCOTCH KIRK.

VENDOR AND PURCHASER. See SPECIFIC PERFORMANCE, 1, 5. TRUSTEE, 1.

VESTED INTEREST. See WILL, CONSTRUCTION, 1.

VOLUNTARY SETTLEMENT.

Residuary estate consisting of money in the funds was bequeathed to a mother and daughter in trust for the mother for life, and afterwards for the daughter absolutely. By a settlement made in contemplation of the daughter's marriage, the daughter assigned her interest under the will to trustees, upon trust for the issue of the intended marriage, and for a niece of the daughter and the issue of the niece. The daughter's husband died soon after the marriage, of which there was no issue. The mother was not a party to the settlement, but had notice of it before the husband's death.

Held, that even if the settlement was voluntary as regarded the trusts in favour of the niece, it was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement against the daughter, and the trustees of another settlement which she made upon a second marriage inconsistent with the former settlement.

Whether the first settlement was voluntary as regarded the trust for the niece, *quære*. — *Kekewich v. Manning*, 176.

WAIVER. See CONTRIBUTORY, 3.

* WILL. •

* 855

1. A testator bequeathed his residuary personal estate (after a life interest) to his grandson to and for his own use; but, if he should die

under twenty-one, without leaving lawful issue, or if he should attain twenty-one and die without leaving issue, and without having disposed of the same by his will, or otherwise, then over. *Held*, upon the construction of the whole will, that in the event (which happened) of the grandson attaining twenty-one, he took an absolute interest. — *Re Yalden*, 53.

2. A legacy was bequeathed in trust for a grandniece for life; and, in case she died without children, for her brother, if he should be then living, but if he should be then dead, then unto his next of kin in a legal course of distribution *ex parte maternâ*. The grandnephew died in his sister's life-time. *Held*, that she took as his next of kin. — *Gundry v. Pinniger*, 502.

See CHARITY. DOMESTIC SERVANT. TRUSTEE, 2, 3.

WINDING-UP ACTS.

A contributory to a joint-stock company had required, under the 37th section, to have notice of all proceedings before the Master in the matter of the company. The official manager being about to submit to the Master proposals for the sale of the works of the company, and for a reserved bidding, it was stated that the solicitor who attended for the contributory was the solicitor of persons desiring to purchase the works, and might, if he was allowed to attend, make use of the information which he would thereby acquire to the prejudice of the estate. *Held*, that the Master was not justified in ordering that the official manager should attend him in private on the matter of the reserved bidding. — *Ex parte Slatter's Executors*, 64.

See CALL, 1, 2. CONTRIBUTORY, 1, 2, 3, 4. COSTS, 2. PUBLIC COMPANY. WORSHIP. See SCOTCH KIRK.

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END OF THE FIRST VOLUME.

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